

The Ohio Film Censorship Law

IVAN BRYCHTA*

INTRODUCTORY NOTE

Based on some fifty legal documents of public record, including primarily acts of the Ohio legislature (about 15 statutes), decisions of the Ohio courts and of federal courts so far as they directly affect the Ohio law (17 main cases), and on approximately fifteen opinions of the Ohio Attorney General, as well as on the examination of a few bills, petitions and certificates and of several state reports and legal articles, there is here presented the result of an attempt to summarize historically and appraise analytically the development of the Ohio law of motion picture censorship from its beginning in 1913 to the present day.

Although the recent changes in the constitutional status of the legal control over the content of motion picture exhibitions conferred an added interest upon the subject matter and supplied an additional motive to treat the topic, we think that the undertaking of the enquiry would be sufficiently warranted by the fact that no monographic study of this part of the Ohio legal order has been written yet, and that, therefore, many a problem and curiosity remained hidden in the scattered and sometimes practically unknown documents. While the possibilities of praising or condemning the institution of censorship in its capacity as a social function have been sufficiently exhausted by a great number of writers, purely legalistic analyses have been comparatively rare. It is natural that from the pragmatic standpoint it should appear more important to be concerned with the substantive interests which a law enhances or suppresses, than with the law itself and for its own sake. But the legalistic method, intent upon the answering of the question *quid juris* and no more, makes the law itself its supreme and exclusive interest, and the determination to reveal the meaning of the law by an impartial and impersonal interpretation is this method's greatest virtue.

When this attitude is assumed, the Ohio film censorship law emerges as a rewardingly engaging subject of study. The Ohio Film Censorship Agency was the first of its kind in the United States, and it was one of the first administrative agencies of the so called quasi-judicial status in the United States. In the history of Ohio admin-

* JUDR, Masaryk University, Czechoslovakia, 1946; Ministry of Codification of Law, Prague, 1947-1948; Graduate Assistant, Dept. of Political Science, The Ohio State University.

istrative law, especially in the history of the licensing process of which censoring is a part, these laws are an important item. There can be found in them more problems of statutory interpretation and more suggestions for legal draftsmanship than could be included in this limited article. In respect to those omitted, we must be satisfied with the hope that some attention shall have been directed to them by this study in an indirect manner.

An exhaustive treatment of a legal subject matter cannot be accomplished without using both the historical and the analytical method. This necessity imposes upon the statement a fundamental dualism, which it is impossible to overcome without paying for the seeming unity a price of confusion. In response to this methodological exigency, this article begins with a chronologically conceived narrative which gives the story of the laws from 1913 to the present day and which lists all the major events and documents of which the history of the law consists. And the article then presents in several subdivisions an analytical treatment of certain selected aspects of the subject matter, the main of which is a critical examination of the basic organizational and procedural scheme by which the film censorship administration operated or operates. The expression "selected aspects" actually characterizes the position of those subdivisions. The necessity to conform to the admissible size of the article has posited several dilemmas and has resulted in the making of several arbitrary choices as to what shall be included and what omitted. Especially some historical aspects of the legislation, though containing interesting interpretative issues, had to be left out.

It is hoped that the summary here presented will be useful for some practical purpose if the censorship of motion pictures should continue in one form or another also in the future; and if it is does not, which seems more probable, it is perhaps good to have had a synopsis of this special but not unimportant legislation before it passes from the realm of actuality into that of history.

In a monograph like this, detail is about all there is available to the student as the substance of which the work can be shaped. If all detail is removed, nothing remains. Nevertheless, little interest would have been found in writing this discussion if not for the theoretical perspectives in which such detail finds its place and meaning. Although broad juristic speculation is a privilege available to a student of law hardly even on holidays, we think that it still remains true that the best part of legal practice is legal theory.

THE CHRONOLOGY OF THE LAW

The legislative proposal which later developed into the original statute of motion picture film censorship¹ was introduced in the

House of Representatives on Monday, February 10, 1913, by Mr. Snyder of the Hamilton County, as House Bill No. 322,² "Providing a board to censor motion picture films and prescribing the duties and powers of the same." Next Wednesday, February 12, the bill was referred to the committee on Judiciary³ and from there it was reported back on April 9, after having undergone, it seems, a radical alteration—for Mr. Snyder, promoting the bill again, proposed to "strike out all after the enacting clause and insert . . ." a new text.⁴ The revised version is essentially identical with the original censorship law as later enacted.⁵ On April 11, second reading took place in the House. A discussion in which there participated Messrs. Winters, Acker, Vonderheide, Winans and Terrell, changed the expression "moving pictures" into "motion pictures," and in course of the discussion there was defeated a proposal which would have restricted the impact of censorship to performances where admission fee was charged.⁶ After the requirement of procedure in the Committee on Phraseology had been waived, the bill was read for the third time, only by title, and a vote was cast, in which the bill was adopted by a unanimous consent of 89. Then it went into the Senate, where the final reading was done on April 16.⁷ The Senate contributed an important provision, viz., Section 8 of the bill, later section 871-53 of the General Code of 1913, the basis of remedial rights. But the proposal to include a clause stating positively that films approved by the Ohio Board of Censors were free to be exhibited anywhere in Ohio, was defeated. (It had been proposed by Senator Lloyd.) Besides these changes there were done, in the Senate, some minor alterations, especially relative to the fees to be collected for the censorship service, and their relation to the length of the films. The bill was then adopted by the Senate in a vote of 23 : 4. On the same Wednesday, on April 16, it was reported back in the House,⁸ where it was signed and enrolled twelve days later, on Monday, April 28.⁹ In the next five days, on May 3, the bill was signed by Governor James M. Cox.¹⁰ And it was filed with the Secretary of State on May 7.¹¹

1 On Ohio legislative process in general, see George B. Marshall, *Life History of a Bill in the Ohio Legislature*, 11 OHIO ST. L. J. 477 (1950).

2 1913 OHIO HOUSE JOURNAL 260.

3 *Id.*, 307.

4 *Id.*, 854.

5 *Ibid.*, confront with 103 OHIO LAWS 399.

6 1913 OHIO HOUSE JOURNAL 912, 913.

7 103 OHIO SENATE JOURNAL 679.

8 1913 OHIO HOUSE JOURNAL 1087.

9 *Id.*, 1264.

10 103 OHIO LAWS 401.

11 *Ibid.*

The act¹² consisted of eight sections, but called into service for film censorship certain sections of the Industrial Commission Act, enacted a little earlier that year.¹³ The Film Censorship Act created a body of censors, provided an abstract standard of censorship, and prohibited public exhibition of films unapproved by the board. It determined a fee to be paid for the examination of the films, stipulated sanctions against the violation of the law, and provided for administrative hearing before the board in behalf of persons dissatisfied with the board's rulings, as well as for judicial review before the Supreme Court of Ohio.

In accordance with the rule that Ohio laws usually go into effect ninety days after the filing of the bill with the Secretary of State,¹⁴ this act went into effect presumably on August 3, 1913, but the prohibition to show uncensored films did not become effective until another ninety days after this date.¹⁵

The first major event in the life of the law was a suit brought before the United States District Court for the Northern District of Ohio, where the act was attacked as unconstitutional. The court upheld the law in its decision of April 2, 1914.¹⁶ In the same month, on April 28, a formal question was settled by the Attorney General, viz., it was determined that the members of the Board of Censors were in unclassified service.¹⁷ In July of the same year, the Attorney General rendered another opinion, one of considerable importance for the status of the early Board. It was determined in this opinion that the Industrial Commission of Ohio, under whose authority and supervision the Board of Censors was to function, had no right to interfere with the discretion of the Board as to the merits of the films under examination, and that no appeal from the Board to the Commission was possible.¹⁸

An Attorney General Opinion of November 5 of the same year, 1914, dealt with certain questions concerning the so-called "stamps" or "leaders," i.e., pieces of film bearing the statement that the film which follows has been approved by the state censorship agency, and some data relative thereto. It was determined in this legal opinion that these "leaders" need not be furnished by the censorship office, but that if they are, they become the property of him who owns

¹² 103 OHIO LAWS 399.

¹³ 103 OHIO LAWS 95, of March 18, 1913. Detailed discussion *infra*.

¹⁴ George B. Marshall, *Life History of a Bill in the Ohio Legislature*, 11 OHIO ST. L. J. 447 at 455.

¹⁵ Section 6 of the act, 103 OHIO LAWS at 400.

¹⁶ *Mutual Film Corp. v. Industrial Comm. of Ohio et al.*, 215 Fed Rep. 138.

¹⁷ 1914 Ohio Atty. Gen. Op. 574.

¹⁸ 1914 Ohio Atty. Gen. Op. 1048.

the film and are not subject henceforth to any authority of the censorship agency.¹⁹

February 23 of the following year, 1915, is a landmark in the constitutional and otherwise legal history of film censorship. On that day the Supreme Court of the United States passed upon the appeal which was designed to contest the decision of the district court, *supra*, and to have film censorship declared unconstitutional. The appellant was to be disappointed. In the well known "Mutual Decisions," the Supreme Court supported the position of the court below and the censorship of motion picture films was sustained.²⁰

The next event in the history of Ohio film censorship was an opinion of the Attorney General of April 15, 1915, in which it was said that the censors must do the censoring themselves and may not delegate this function to assistants.²¹ But the legislature went into action. Within a little more than a month, on May 19, it passed an act which authorized the Board of Censors to delegate the censoring function to assistants working under the censors' supervision, and, responding to the previously settled issue of the "stamps" or "leaders," *supra*, the legislature ordained that official leaders and not privately prepared items must be projected upon the cinema screens, and that these official leaders will be issued by the Censorship Board. And under criminal sanction it was prohibited to counterfeit these leaders or otherwise undesirably to manipulate them.²² In summer of that year, an attempt was made to defeat the new law, and perhaps the whole censorship law, by a referendum, but the effort was not successful.²³ For the original act, it was too late.

The year 1916 brought, apart from a comparatively unimportant opinion of the Attorney General,²⁴ the beginning of a series of interesting litigations, all of them—altogether three cases—instituted by the Epoch Producing Corporation and all of them dealing with the film *The Birth of a Nation*. The corporation, defending itself against a number of adversities coming from various sources, had suits before three types of courts and prepared the occasion for settling a number of questions.

On January 4, 1916, the Epoch Corporation applied to the Board of Censors for a certificate of approval for the film, but the Board rejected the film on January 11, and rejected also the applica-

¹⁹ 1914 Ohio Atty. Gen. Op. 1375.

²⁰ *Mutual Film Corp. v. Industrial Comm. of Ohio*, 236 U.S. 230; *Mutual Film Corp. of Missouri v. Hodges*, Governor of Kansas, 236 U.S. 248.

²¹ 1915 Atty. Gen. Op. 465.

²² 105-106 OHIO LAWS 325.

²³ 1915 Ohio Atty. Gen. Op. 1229; *id.*, 1522.

²⁴ 1916 Ohio Atty. Gen. Op. 235. It repeats that the members of the board of censorship are within the unclassified category of civil service, which already was settled once; *supra*. The opinion was rendered on February 3, 1916.

tion for an administrative hearing.²⁵ The corporation appealed. Its petition, styled petition in error,²⁶ is an important document, first, because it is the only petition from the early period of film censorship now easily available, and second, because it is one of the very few documents representing an error proceeding under section 871-38 of the General Code, while almost all the rest have been mandamus proceedings.²⁷ The Ohio Supreme Court, to which the appeal was directed in accordance with the law, rendered a decision on October 24, 1916.²⁸ Adopting in this case a practice which any court, if it be one of justice, would be well advised not to follow, the court dismissed the petition on ground of the fact that the censorship agency failed to supply a satisfactory record of the administrative procedure, which it was obligated to supply according to the law. The court, be it noted, did not hold the agency by mandamus or procedendo to supply the missing material, but it was the private party which was made to suffer for the negligence of the government. The plaintiff then filed an application for rehearing, pointing out the essential injustice of this proceeding, and the application was rejected:²⁹ a rare exception to the traditional friendly attitude of the judiciary toward private rights.

But this time, the administrative branch itself showed the desired benevolence and reconsidered the case. On February 1, 1917, more than a year after the original application for the approval of the film, the censorship agency granted the license to the corporation.³⁰ The agency certified in the license that the film was moral, educational, and harmless. The victorious corporation then entered into contracts with motion picture film exhibitors, especially with the Euclid Avenue Opera House in Cleveland, and the first performance was scheduled for April 9, 1917. But the joy was premature.

On April 2, the city council of Cleveland, "by resolution protested against the public exhibition of said photo-play."³¹ And the next day the mayor, Mr. Davis, informed the manager of the cinema that he had instructed the Director of Public Safety to take steps necessary

²⁵ See Seba H. Miller, *THE LAW AND PRACTICE IN ERROR PROCEEDINGS AND IN ORIGINAL ACTIONS IN THE SUPREME COURT OF OHIO*, Cincinnati, The W. H. Anderson Company, 1924, 342ff.

²⁶ Reprinted in Miller, *op. cit.*, 341ff. The petition was certified on May 1, 1916. *Id.*, 344, 345.

²⁷ *Infra*.

²⁸ *The Epoch Producing Corp. v. The Industrial Comm. et al.*, 95 Ohio St. 400.

²⁹ Miller, *op. cit.*, 340.

³⁰ *The Epoch Producing Corp. v. Harry L. Davis, Mayor of Cleveland*, 19 Ohio N.P.N.S. 465 (1917).

³¹ *Ibid*.

for the prevention of the exhibition.³² The news of this development found the Epoch Corporation in a bellicose mood. It filed equity suits for injunction in two courts; first, in the Federal District Court for the Northern District of Ohio, basing jurisdiction on alleged diversity of citizenship;³³ second, in the Cuyahoga Court of Common Pleas as court of general jurisdiction.³⁴ On April 7 and on April 10, the respective decisions were available. The federal court dismissed the suit for lack of jurisdiction. The common pleas court rendered an historical decision laying down the principle that municipalities had no jurisdiction in film censorship matters after the censorship function was assumed by the state government. The mayor was enjoined from interfering. Since, only one attempt has been made to add local censorship to central censorship. This was in 1938, twenty-one years after the precedent. Also in this instance, the local government, viz., the city of Cincinnati, incurred a defeat.³⁵

The battle of cinemas with local censors under way, the central censorship bureau was occupied with another affair. Obviously holding that the law meant every copy of every film to be subjected to inspection and to the collecting of fees, the agency observed with dismay that some of the exhibitors simply cut the official leader into two or more pieces and attached the fragments to as many copies as possible, thus avoiding the payment for a number of copies. The censors requested the Attorney General to determine whether their agency had the right to examine the books of the film producers and exhibitors in order that these practices might be revealed and eliminated. But the Attorney General answered in the negative.³⁶ This opinion of the Attorney General is the last document publicly available which pertains to the first of the two major periods of the development of the film censorship administration.

The year 1921 brought a radical change in the organization of this service.³⁷ The new Administrative Code³⁸ discarded the Board of Censors of Motion Picture Films and transferred the function to the Department of Education, created simultaneously as an organ of the already existing function of the Superintendent of Public Instruction, who in respect to his new department became the director of the Department of Education, and has been briefly called the

³² *Id.*, 466.

³³ Epoch, etc. *supra*; 15 Ohio Law Rep. 405 (1917).

³⁴ Epoch, etc. 19 Ohio N.P.N.S. 465 (1917).

³⁵ The American Committee on Maternal Welfare, Inc. v. Cincinnati, 11 Ohio Op. 366 (1938).

³⁶ 1917 Ohio Atty. Gen. Op. 737, of May 21.

³⁷ The word "service" is used here in a neutral sense, not as an expression of a latent value-judgment to be opposed to "disservice."

³⁸ 109 OHIO LAWS 105 (1921).

Director of Education. This officer then became the censor *ex officio*, and the newly created "Advisory Board of Film Censorship," conceived as in some sense "in" the Department of Education but not as a regular part thereof, was understood³⁹ as having no more than an advisory voice in the matter. This advisory board is not identical with the "Division of Film Censorship", also created by the new law. The Division is a regular part of the Department of Education, its members are civil servants of the classified category, are paid and must follow lawful orders of the Director of Education. None of this is true of the advisory board of censorship, whose members are neither paid nor subject to the Director of Education—they are appointed by the governor of the state. By this reorganization, the collegiate structure of the censorship administration was transformed into a one-man office and the Director of Education has been, ever since, the sole judge and the supreme authority of and over all film in Ohio. The record indicates⁴⁰ that he has been a vigilant and energetic guardian of all the rights inherent in this office, and a little beyond.

The year 1923 brought a further extension and elaboration of punishments and penalties available to disobedient film agents. Vetoed by the governor, the bill was passed notwithstanding the protest.⁴¹ This law set the frame of the criminal aspect of the film censorship legislation, which essentially lasts until the present day.

Certain ambiguities in the law of 1921 caused a litigation where the continuity of the pre- and post-1921 law was analyzed in detail, especially the question was asked if the remedial rights of private parties still existed. Affirmative answer was given in the case of *Edward Sullivan v. Vernon M. Riegel, As Director of Education of Ohio, Division of Film Censorship*.⁴² Action for injunction was instituted in the common pleas court (Franklin County) because the plaintiff believed that his recourse to the Supreme Court of Ohio was no longer available to him. In the merits, he opposed the revocation of a permit previously given by the state censorship administration (Mr. Riegel), mainly on the ground that the unfavorable information proceeding from some Senate investigations in Washington (the case does not say exactly what) and allegedly relative to his film, did not actually refer to his film. In a proceeding which is not on the record and to which only reference is made, Mr. Sullivan succeeded in obtaining the injunction, probably from another judge of the same court. The case was re-tried upon the answer of Mr. Riegel, and Sullivan lost. Apart from discarding the injunction on ground of lack of jurisdiction, the common pleas court as one of equity also denied help

³⁹ See esp. 1922 Ohio Atty. Gen. Op. 269, of April 13.

⁴⁰ *Infra*.

⁴¹ 110 OHIO LAWS 348.

⁴² 25 Ohio N.P.N.S. 118, May 29, 1924.

on the ground that Mr. Sullivan was not a bona fide petitioner, since his film was presumably transported into Ohio in violation of a federal law.⁴³ This is the first instance in which censorship proceedings are related to facts other than the content of a film. Further cases were to follow.

Twice in the legislative history of Ohio an attempt was made to regulate motion picture contracts. In 1927, the legislature sought to enact a law enforcing fair competition practices. In his opinion of April 13, 1927, the Attorney General held, however, that motion picture business is not so affected with public interest as to justify such legislation (contrary to the general principle of freedom of contract, guarded by the Ohio and national constitutions), and the bill was never passed.⁴⁴ The second attempt was made in 1935, *infra*.

Later in the year, on August 6, 1927, the Attorney General dealt with the issue, mentioned above, as to whether it was lawful for the censorship agency to approve for public exhibition a film which was unlawfully transported, although in itself quite acceptable under the censorship standards. And he concluded that such an approval would constitute an abuse of discretion.⁴⁵

In January of the next year, 1928, a second supreme court case was decided. Confident that prize fight films enjoyed no great popularity with the courts, the then Director of Education, Mr. Clifton, rejected one such film, entitled *Dempsey Tuney Boxing Exhibition Held At Chicago, Ill., September 22, 1927*, without examining it at all, and basing his judgment, as he said, on his general knowledge of the subject. This time, however, the court was not on the government's side. It voided the order of the Director and remanded the case for proper proceedings.⁴⁶

The development of the "sound track" accompanying the film exhibition instead of visual explanatory notes led to the question as to whether also sound was subject to censorship, and in his opinion of June 11, 1928, the Attorney General answered the question in the affirmative (Opinions of Ohio Attorney General of 1928, page 1447).

For the five following years, there were no events in film censorship affairs reflected on the public record. Only in 1933 a noteworthy

⁴³ It was a film named *The Battle of the Age for the Heavyweight Championship of the World—Jack Dempsey and Luis Angel Firpo*—a prize fight film and as such banned from interstate transportation by common carriers. It was not shown that the film was transported in the unlawful way, but the court assumed it.

⁴⁴ 1927 Ohio Atty. Gen. Op. 546.

⁴⁵ 1927 Ohio Atty. Gen. Op. 1479.

⁴⁶ *State ex rel. Midwestern Film Exchanges, Inc. v. Clifton, Director of Education*; and *Mantell v. same*, 118 Ohio St. 91. Technically, the first case was styled *mandamus*, the second petition for review. Certain difficulties of procedural forms are present here, to be discussed below.

thing happened—the newsreel was exempted from censorship,⁴⁷ only to be subjected to it again in April, 1935.⁴⁸ The year 1933 also brought, in June, a recodification of the penal part of the film censorship law.⁴⁹ In 1935, a second attempt was made to regulate motion picture film contracts. This time the legislature sought to outlaw contracts which stipulated that a film shall be shown on certain days of the week. The Attorney General gave an unfavorable opinion,⁵⁰ but three days later the bill became law nevertheless⁵¹ and remained on the statute books for several years. It is difficult to guess the motive of this act. If it were intended to protect the observance of certain holidays, it was redundant since a contract stipulating that an exhibition of film shall take place on a day when such exhibitions are prohibited by law is, pro tanto, automatically void. If, on the other hand, the law were intended to relieve the pressures upon the censorship agency arising from contractual compulsion to show a film before a deadline expires, it seems the law should have spoken about “dates” and not “days.”

Another law important for film censorship proceedings, although not dealing with censorship specially, was the 1935 enactment known as the Appellate Procedure Act of April 22.⁵² In still another law of the same year, mentions can be found of the Division of Film Censorship, but they have no normative relevancy.⁵³

The third supreme court case arose in 1937. The case,⁵⁴ which was decided on June 30, is important for reasons of procedure, and forms a counterpart to the recent case of *Classic Pictures v. Department of Education* of October 15, 1952.⁵⁵ Both these cases revolve around the question whether the petition for review of the administrative order, which petition must be submitted, according to the law, in the form of an original action, is an appeal or not. In this respect these cases are tied together with the twofold Hallmark case of 1950, *infra*, also dealing with the problem. All of these cases have been considered, in this respect, in a somewhat superficial manner, and the supreme court never arrived at any satisfactory conclusion as to what the

⁴⁷ 115 OHIO LAWS 199, of April 11, 1933.

⁴⁸ 116 OHIO LAWS 100.

⁴⁹ 115 OHIO LAWS 308.

⁵⁰ 1935 Ohio Atty. Gen. Op. 371, of April 5.

⁵¹ 116 OHIO LAWS 58, of April 8.

⁵² 116 OHIO LAWS 104.

⁵³ 116 OHIO LAWS 511, at 512.

⁵⁴ *North American Comm. to Aid Spanish Democracy v. Bowsher, Director of Education, Div. of Film Censorship*, 132 Ohio St. 599 (1937). The film involved was named *Spain in Flames*, and was banned for alleged stirring of racial hatred.

⁵⁵ 108 N.E. 2d 319 (1952).

procedure actually is. The fault inheres, as shall be seen below, primarily in the law itself. In any event, the court has been and is of the opinion that the appellate act is applicable in determining the deadlines for the institution of the remedial proceedings, while under the censorship law proper no time limits are set and possibly the access to the court would remain, under the latter law, indefinitely open.⁵⁶

On May 23, 1938, the Hamilton County Court of Common Pleas again confirmed the decision of some two decades ago, *supra*, that local censorship had no place in Ohio.⁵⁷ And again for five subsequent years there was no event on the record. Only in 1943 two major events occurred—the enactment of the Uniform Administrative Procedure Act for licensing agencies,⁵⁸ which affects film censorship as a form of licensing, and the enactment of the extensive reorganization and recodification act of June 17, 1943,⁵⁹ which repealed all previous legislation on film censorship and enacted a new text, now valid with the amendment of 1947.⁶⁰ Nothing essentially new for film censorship was brought by the act of 1943, except that the administrative hearing, as a prerequisite for judicial review, was abolished.

The censorship administration made, in autumn 1945, an attempt to re-collect fees from owners of films already processed, whenever a film passed from one person to another. The Attorney General, asked about the lawfulness of this contemplated practice, answered, not without some temperament, that owners of films were not subject to censorship.⁶¹

The last enactment of normative relevancy for motion picture film censorship in Ohio is the act of June 9, 1947, whereby motion picture trailers, all the parts of which have been included in a previously censored film, are exempt from censorship.⁶² After this, the only legislative mention of the censorship agency is found in an act of May 12, 1949, but the mention is without normative import.⁶³

On October 6, 1949, an opinion was rendered by the Attorney General in which it is settled that titles of films are an intrinsic part of the film and, as such, subject to censorship under the statutory standard, but that it is not for the censorship agency to consider whether the title of a film reflects faithfully the film's content.⁶⁴ And

⁵⁶ *Contra*, Miller, *op. cit.*, 339

⁵⁷ American Committee on Maternal Welfare v. Cincinnati, 11 Ohio Op. 366.

⁵⁸ 120 OHIO LAWS 358, of June 4.

⁵⁹ 120 OHIO LAWS 475; on censorship, pp. 481ff.

⁶⁰ 122 OHIO LAWS 241, of June 9.

⁶¹ 1945 Ohio Atty. Gen. Op. 704, of November 5.

⁶² 122 OHIO LAWS 241.

⁶³ 123 OHIO LAWS 84 at 87.

⁶⁴ 1949 Ohio Atty. Gen. Op. 705.

on February 8, 1950, the Attorney General held that it was not the concern of the censorship administration to consider private aspects of motion picture actors' lives in determining the eligibility of a film.⁶⁵ On June 7 of the same year, two cases of an identical content but of different procedural form were decided by the Ohio Supreme Court—the Hallmark cases, a litigation of great significance from the standpoint of procedure.⁶⁶

The present year, 1952, brought forth a development which had long been anticipated—the revision by the Supreme Court of the United States of its 1915 position on the constitutional status of motion picture film censorship. In *Joseph Burstyn, Inc., v. Wilson, Commissioner of Education of New York*, a case decided on May 26, 1952, the Court enunciated the principle that essentially motion picture films are protected by the Constitution of the United States as much as the press of the land,⁶⁷ and the later case of *Gelling v. Texas*⁶⁸ was decided on the same basis. Under this authority, the enforcing courts of Ohio refused to apply the film censorship law, at least to the newsreels. An information of September 10, 1952, on a case decided, probably on that date, by the Toledo Municipal Court, exemplifies the trend.⁶⁹ The last event on the record so far, however, is an appellate case decided by the Supreme Court of Ohio on October 15, 1952, and in this case no constitutional question was raised. It is a mere petition to review an order of the censorship administration.⁷⁰ For the theoretical part of our enquiry, this case is of great importance because of formal questions of procedure, *infra*.

The next major event is scheduled to occur on February 4, 1953. It will be the day of decision of a case now pending before the Ohio Supreme Court, in which the question of the constitutionality of the Ohio statute is directly posited.⁷¹ In the long life of the Ohio film censorship laws, this event may be the last; but the Department of Education entertains a less pessimistic view. At any rate, the losing party is likely to proceed with its hopes to the highest tribunal of the

⁶⁵ 1950 Ohio Atty. Gen. Op. 80.

⁶⁶ Hallmark Productions, Inc. v. Dept. of Education, Division of Film Censorship, 153 Ohio St. 595, and 596. The film involved was called *The Devil's Weed*.

⁶⁷ 343 U. S. 495 (1952).

⁶⁸ 343 U. S. 960 (1952).

⁶⁹ Probable name of the case is *State v. Martin G. Smith*. See *Judge Rules Out Censorship of Ohio Newsreels*, The Columbus Evening Dispatch, Sept. 10 (1952) p. 1; *Movie Wins Test of Censorship*, The Columbus Citizen, Sept. 10 (1952) p. 1.

⁷⁰ Classic Pictures v. Department of Education, 108 N.E. 2d 319 (1952).

⁷¹ Information of the division of film censorship in the Ohio Department of Education.

land. It is now of interest to examine the constitutional history of motion picture film censorship in the United States.

CONSTITUTIONALITY.

Until the recent cases in which the censorship of motion pictures was declared by the Supreme Court of the United States to be essentially as repugnant to the Constitution as the censorship of the press,⁷² the right of the government to regulate motion picture performances was upheld throughout the nation on the basis of a distinction made between places of amusement on one hand and media of information, discussion or free trade of ideas, on the other. There is no Supreme Court case to determine specifically that the expression of ideas on the theatrical stage shall not enjoy the protection given to ideas expressed in printed matter. But the leading cases of 1915 which refused to protect the freedom of cinemas employ an argument from which it is obvious that the Supreme Court at that time considered it to be a self-evident truth that theaters in general might be and ought to be subject to licensing, and that licensing included also the control over the idea content of the plays presented to the audience. These are the well known litigations of the Mutual Film Corporation versus the censorship agencies in Ohio and in Kansas,⁷³ to be discussed in more detail below. The first of these cases, arising in Ohio, governed the constitutional interpretation of the status of cinemas in respect to the freedom of expression for almost four decades.

Prior to the Supreme Court decision in the *Mutual* cases, which dealt with state laws imposing censorship on motion picture films, there had been decisions of lower courts, especially state courts, sustaining regulations of theaters in general⁷⁴ and of cinemas in special.⁷⁵ These decisions dealt with local ordinances.⁷⁶ In the case of *Cincinnati v. Brill, supra*, it was held that:

⁷² *Burstyn v. Wilson*, 343 U. S. 495 (1952). *Gelling v. Texas*, 343 U. S. 960 (1952).

⁷³ The Supreme Court cases are: *Mutual Film Co. v. Industrial Comm. of Ohio*, 236 U. S. 230 (1915); same, 236 U. S. 247 (1915); *Mutual Film Co. v. Hodges, Governor of Kansas*, 236 U. S. 248 (1915). The first of these cases originated before the Federal District Court for the Northern District of Ohio: 215 Fed. Rep. 138 (1914).

⁷⁴ *City of Cincinnati v. Brill*, 5 Ohio Dec. 566 (1890-1897).

⁷⁵ There is no Ohio case. The leading case usually quoted is *Block v. Chicago*, 239 Ill. 251 (1909).

⁷⁶ Local ordinances have been regulating film exhibitions in those states where central state censorship was not established, and attempts have been made to continue local censorship in addition to state censorship. See *infra*, "Central and Local Censorship." It is said that at the present time more than one hundred localities in the United States have such statutes. Hollis Alpert, *Talk With a Movie Censor*, THE SATURDAY REVIEW, Nov. 22, 1952, p. 21.

A city council has the right to prescribe reasonable ordinances regulating the actions of theatrical managers in the operation of their business,

and cinemas were considered and later declared to be theaters in several Ohio cases,⁷⁷ which leads logically to the conclusion that the managers of cinemas are subject to regulation in respect to their business and that therefore motion picture films can be lawfully regulated. Such regulation has been considered an aspect of the so-called police power of the state,⁷⁸ which power, *inter alia*, also includes the power to grant or withhold licenses. Obviously what a local ordinance can do a state law can do *a fortiori*, since municipal power is but a derivation of the central power of the state,⁷⁹ unless otherwise provided by the state constitution.⁸⁰

With these antecedents the task of the Supreme Court of 1915 was not very difficult. All it had to do was to measure the Constitution with the existing practice, rather than the other way about, as would seem to be the requirement of jurisprudence. And this way of least resistance the Court employed.

As pointed out by the District Court,⁸¹ [the Supreme Court said,] the police power is familiarly exercised in granting and withholding licenses for theatrical performances as a means of their regulation. . . . The exercise of the power upon moving picture exhibitions has been sustained . . . (236 U. S. at 244).

And with the silent implication that what is familiar is also legitimate, the Court evaded the issue of whether the familiar practice was constitutional. This position was further reinforced by the strategy of placing an overwhelming emphasis upon those elements in motion picture exhibitions which have no connection with civil liberties, as if the presence of these factors inevitably made impossible the presence of elements to which constitutional protection does apply. In this sense the Court stressed the fact that cinemas are business pure and simple conducted for profit, and that they are spectacles comparable to the burlesque, the pantomime, or the circus. Couched in a language of moral indignation more than in that of legal analysis,⁸²

⁷⁷ *Richards v. State*, 110 Ohio St. 311 (1924); *Standen v. State*, 8 Ohio App. 163 (1917); *Myers v. State*, 5 Ohio App. 156 (1916).

⁷⁸ *Ibid.*, and *Marmet v. State*, 45 Ohio St. 63 (1887); *Baker v. Cincinnati*, 11 Ohio St. 534 (1860).

⁷⁹ 37 Am. Jur. 621.

⁸⁰ *Cf. Epoch v. Davis*, 15 Ohio Law Rep. 405 (1917); *Maternal Welfare v. Cincinnati*, 11 Ohio Op. 366 (1933).

⁸¹ The district court said, 215 Fed. Rep. at 143, that the Ohio statute "provides in effect for licensing the use of films."

⁸² *Cf.*, the words "Counsel have not shrunk from this extension of their contention and cite a case in this Court where the title of drama was accorded to pantomime . . .; and such and other spectacles are said by counsel to be publica-

the opinion of the court appears to have been intended to picture the claim of the appellant as a complete absurdity and insolence. Like so many other judicial decisions, also this one is an expression of volition rather than cognition, and accordingly it appeals more to emotion than reason. At the time of its publication, however, it commanded a general assent.⁸³ The arguments discussed by the Supreme Court in this case had been essentially prepared for it, however, by the district court in the decision of 1914, *supra*, and since this latter case is less known although it contains some issues of interest which did not reach the Supreme Court, it may be apposite to examine briefly its implications.

The most important of them is the contention of the appellant that the First Amendment is applicable to the action of the states by virtue of the Fourteenth Amendment, an interpretation which anticipated by a dozen years the decision of *Gitlow v. New York*.⁸⁴ In contradistinction to the latter case, however, this argument invokes not the Due Process part of the Fourteenth Amendment, but the Privileges and Immunities Clause. This was an ingenious device to defeat the then interpretation of the Constitution by its own weapon. Since on the authority of *Eilenbecker v. District Court of Plymouth County*⁸⁵ the first eight amendments were considered to "have reference only to powers exercised by the United States and not to those exercised by

tions" p. 243. Or: "We immediately feel that the argument is wrong or strained which extends the guaranties of free opinion and speech to the multitudinous shows which are advertised on the bill boards of our cities and towns and which regards them as emblems of public safety [?] . . . " *Id.*, at 243, 244.

⁸³ 80 CENTRAL LAW JOURNAL 307, for instance, in an article of April 23, 1915, entitled *Freedom of Speech and Boards of Censors for Motion Picture Shows*, expresses a great amazement at the idea of the appellant in the case, to demand freedom of the press for films. It says: "What a variety of questions are raised under the general clauses of our fundamental law by the ever-progressive invention of our people! But as startling a one in its novelty, as we have noted, is that whereby claim is made for freedom of speech in the product of a mechanical device on a curtain in a motion picture theater. It is a little difficult to grasp the idea of the personality of an individual in what a machine, that is his property, produces to the public eye and apprehension, as his thought and expression of sentiment, even though it connectedly, through its product, points a moral or adorns a tale." And the writer concludes, metaphysically: "Is the personality ubiquitous through and by machine, if it duplicates, if the word is allowable, the same moral and the same tale contemporaneously and in different places? If it could be there, at one and the same time, but without the machine, it would be as if it were not." 13 MICH. L. REV. 515 said: "It cannot be well argued that such a statute is in opposition to the constitutional provisions regarding 'freedom of the press.' If moving picture shows come within this provision, so do theaters and all public performances." Among legal periodicals, only the COLUMBIA LAW REVIEW appears to have firmly opposed the Supreme Court's position. Vol. 15, p. 546.

⁸⁴ 286 U. S. 652 (1925).

⁸⁵ 134 U. S. 31, 31, 34, 35 (1890).

the States," then the liberties under these amendments were privileges and immunities of the citizens of the United States which no state might abridge. This argument was avoided by the court, and the counsel obviously was so distrustful of the adventurous construction of the Constitution that the issue was abandoned in the bill presented later to the Supreme Court.

A strong emphasis was laid in the case upon the fact that only *previous* restraint was challenged by the appellant, while no objection was made to laws imposing subsequent punishment for the exhibition of certain films.

The contention [said the court recapitulating the position of the appellant] is not that persons displaying improper pictures may not be punished after the act; but it is that the display itself cannot be prevented. This is not a denial of the existence of evil practices growing out of this class of public exhibitions; it is a challenge of the power of the state to avoid such practices through the exercise of any measures of prevention.⁸⁶

This emphasis upon the limits of the claim was necessary in order to satisfy the Ohio constitution, on which appellant mainly relied. The constitution expressly stipulates that the exercise of freedom of speech is subject to responsibility for its abuse.⁸⁷ Under the Ohio constitution, the court faced two further questions—first, whether a corporation, which the appellant in this case was, was a "citizen"; and whether motion picture exhibitions were a medium of speech and publication. By denying the second proposition, the court made it unnecessary to consider the first.

Analysis of the bills and affidavits—the court said—not to speak of familiar knowledge, serves to show that an exhibition of these motion picture films, with its inclosure, surroundings, and attendance, has all the material attributes of an ordinary theater. . . .⁸⁸

From this notion, then, it follows for the court automatically that there is nothing to protect.⁸⁹ One might well say that where there is nothing to protect there is nothing to censor. But the court, apparently suspecting that there might be some injury to civil rights contained in the law, expresses the consolation that:

⁸⁶ 215 Fed. Rep. 139.

⁸⁷ "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press. OHIO CONST. ART. I, §11.

⁸⁸ 215 Fed. Rep. at 142, 143.

⁸⁹ Similarly as it was said in *Greenberg v. Western Turf Ass'n.*, 148 Cal. 126, 128 (1905): "The state, in the exercise of its police power, has the unquestioned right to regulate these places of public amusement, and it is in the exercise of this power, and not at all as having to do with civil rights, that the act . . . was upheld . . ."

If this interpretation of the statute is at all admissible, it is a mistake to ascribe to the Legislature a purpose to do anything inimical to the principle of freedom of the press.⁹⁰

In other words, the effect is considered excused if the purpose has been good.

Summarizing these arguments, we arrive at a set of propositions, each of which, if valid, would be enough to deny motion picture exhibitors the protection of constitutional guaranties. (1) The police power of the states, of which licensing is an aspect, is by definition incapable of violating any constitution. (2) But if it does, in effect, violate a constitution, it is not the effect, but the purpose, which must be considered relevant, and the purpose of a Legislature is always good. (3) In those states where corporations are not citizens and where state constitutions protect the liberties of citizens only, corporations have no right to speak, write, or publish. (4) And in any event, motion picture films are not media of thought because cinemas are ordinary theaters conducted for profit. To this collection one might add a fifth principle, more conspicuously present in the Supreme Court decision and already mentioned, *viz.*, that (5) unconstitutional actions, if repeated often enough, become constitutional.⁹¹ In the imposition of censorship upon film, all these propositions have been combined to sustain the measure. It is unnecessary to undertake a refutation here because the fallacies have been amply exposed in juristic literature of the last fifteen years⁹² and denounced by the Supreme Court itself.⁹³

The next issue considered by the federal district court in the *Mutual* case was that of interstate commerce.⁹⁴ The court observed, under the aegis of the original package doctrine, that "In each instance commerce ceases where local use begins,"⁹⁵ and that censorship affected the films only after they were in local use. It was also determined that films circulating among the several states were not imports, but if they were, the fee collected for censorship was considered small enough to remain within the scope of an inspection fee; and if it was not, the court expressed the hope that the legislature would diminish the fee.⁹⁶

⁹⁰ 215 Fed. Rep. at 143.

⁹¹ Precisely this principle of jurisprudence is enunciated in 80 CENTRAL LAW JOURNAL 307 in the following words: "... to understand what may be included under the general right of freedom of speech we are to look to analogous things which have been regulated notwithstanding such right, for a proper conception of what is embraced in the right."

⁹² See, e. g., 36 CORNELL L.Q. 273, at 278 (1951), 49 YALE L.J. 87 (1939); 39 COLUMBIA L. REV. 1383 (1939).

⁹³ *Burstyn v. Wilson*, *supra*.

⁹⁴ 215 Fed. Rep. at 145 *et seq.*

⁹⁵ *Id.*, 146.

Lastly, the statute was examined under the Due Process requirement; specifically, on the score of definiteness of standards under which the censorship administration was to apply the law.⁹⁷

We are . . . constrained to believe—the court said—that, under the present rule of decision of Ohio alone, the primary standard here prescribed is sufficient to avoid the charge that legislative power is delegated.⁹⁸

And it was, moreover, pointed out that the right of judicial review further restricts the possibility of an arbitrary action on the part of the administrative agency. The court then closed the case with the words,

We are unable to find anything in the act that is opposed to either the state or federal Constitution. (*Id.*, at 149.)

This decision was handed down on April 2, 1914, and in less than a year, on February 23, 1915, the Supreme Court of the United States was unanimous in sustaining the arguments of the court below.⁹⁹ The only novelty in this case is the absence of any reference to the federal Constitution in respect to civil rights, and on the other hand the introduction of an objection against the "censors congress" for which the law provided¹⁰⁰—an institution of possibly extraterritorial powers and possibly alienating the sovereignty of the state of Ohio. The Supreme Court dismissed this issue on the ground that the censor congress was not as yet in actual existence.¹⁰¹ For the philosophy of censorship as understood by the Supreme Court at that time is important the passus which expresses the belief that:

The terms of the statute, like other general terms, get precision from the sense and experience of men and become certain and useful guides in reasoning and conduct.¹⁰²

And the reference to judicial review as a safeguard against arbitrary action of the administrative element¹⁰³ may serve us to construe the scope of judicial review under the Ohio statute—for this reference indicates that the Supreme Court understood that such review would go into the merits of the cases.¹⁰⁴

⁹⁶ *Ibid.* The hope did not realize.

⁹⁷ *Id.*, 147.

⁹⁸ *Id.*, 148.

⁹⁹ *Mutual v. Industrial Commission*, 236 U. S. 230.

¹⁰⁰ 103 OHIO LAWS at 400.

¹⁰¹ 236 U.S. at 231, 246 and 247. The only form in which it later did come into existence was that the censorship bureaus of the various states exchanged correspondence in order to introduce some measure of uniformity in applying the standards of censorship—an action which actually was helpful to the film industry.

¹⁰² *Id.*, at 246.

¹⁰³ See section on Judicial Review, *infra*.

After the constitutional aspect of film censorship was settled in 1914 and 1915 by these decisions, accepted by the nation without wide opposition, the censorship statutes found themselves well entrenched in their legal position. Altogether seven states enacted such laws: Kansas, Louisiana, Maryland, New York, Ohio, Pennsylvania, Virginia.¹⁰⁵ Ohio and Kansas were the first ones, introducing censorship as early as 1913.¹⁰⁶ The Ohio statute had once to overcome an attempt of the Ohioans to defeat it by referendum¹⁰⁷ and once the opposition of the governor,¹⁰⁸ but it survived both and the legislature proceeded energetically to make its terms more rigorous and penalties more numerous, as well as to increase the fees collected for the service of censorship.

Yet under the surface of events, time was working to change both the law and the fact. The federal Constitution began to protect the individuals' free expression against the states,¹⁰⁹ and motion picture films developed from the rudimentary state of 1914 into an accomplished form of a thought medium. No one could fail to see that film was a powerful vehicle for the transmission of ideas. Around 1939 and thereafter, legal periodicals began to denounce film censorship as unconstitutional.¹¹⁰ The film industry was preparing to conquer.¹¹¹ The strategy was to bring a test case by violating the law through the showing of an unapproved newsreel, because it was believed that newsreels, if no other films, would be certainly recognized by the courts as a part of the press of the land.

Combining courage with civil wisdom, the film industry then took thirteen more years for deliberation and at last brought a case not by violation of the law but on appeal. It was a civil case which overthrew the existing form of film censorship.¹¹² Just when this litigation was arising on the state judicial levels,¹¹³ one of the most bitter attacks against film censorship was published in a leading legal

¹⁰⁴ 236 U.S. 230, 247 (1915).

¹⁰⁵ Cf., *Film Censorship: An Administrative Analysis*, 39 COL. L. REV. 1383 at 1385.

¹⁰⁶ 103 OHIO LAWS 399; 1913 KANSAS LAWS, ch. 294.

¹⁰⁷ 1915 Ohio Atty. Gen. Op. 1229, 1522.

¹⁰⁸ 110 OHIO LAWS at 350 (1923).

¹⁰⁹ *Gitlow v. New York*, *supra* (1925).

¹¹⁰ See note 92.

¹¹¹ A memorandum was elaborated by Messrs. Hawkins and Pettijohn as of January 3, 1939, *On the Constitutionality of the Censorship of Newsreels, et al.*, mimeographed. Obtained by this writer by courtesy of Mr. Frederic Wirt, Department of Political Science, The Ohio State University.

¹¹² *Burstyn v. Wilson*, 343 U.S. 475 (1952).

¹¹³ *Burstyn v. Wilson*, 278 App. Div. 253 (N.Y., 1951); same, 303 N.Y. 242 (1951).

periodical,¹¹⁴ which did not remain unnoticed by the courts dealing with the *Burstyn* case. Moreover, the court observed that the tendency to reverse the 1915 decision manifested itself in the case of *United States v. Paramount Pictures*,¹¹⁵ but it also observed that a re-reversal and a return to the 1915 position was implicit in a denial of certiorari in another case, *Rd. Dr. Corp. v. Smith*.¹¹⁶ Considering it improper for itself as an intermediate court to reverse what appeared to be a still valid precedent, the Supreme Court of New York upheld the censorship statute of the state.

The mood of the courts was also indicated when in another case arising from the same train of events the court said that against films considered undesirable the public could protect itself primarily by ignoring the film.¹¹⁷

In this atmosphere the *Burstyn* case, dealing with the film, *The Miracle*, as a part of a trilogy entitled *The Ways of Love*, reached the Supreme Court of the United States and was decided on May 26, 1952.¹¹⁸ The position of the appellant was uniform throughout the revisory proceedings. It was not its intention to argue whether the film was sacrilegious, as contended by the censorship administration under the New York statute, but the contention was that the statute itself was unconstitutional. This was claimed on three counts. (1) The statute violates the guaranty of freedom of speech under the Fourteenth Amendment; (2) It violates the guaranty of separate state and church under the same Amendment; (3) It violates Due Process under the Fourteenth Amendment because of indefiniteness of the standards under which administrative action is to be exercised.¹¹⁹ The Commerce Clause argument of the *Mutual* litigation was entirely omitted. The Court determined the scope of the problem as follows:

As we view the case, we need consider only appellant's contention that the New York statute is an unconstitutional abridgement of free speech and a free press.¹²⁰

The factual question whether film exhibitions are an instru-

¹¹⁴ Theodore R. Kupferman and Philip J. O'Brien, Jr., *Motion Picture Censorship—The Memphis Blue*, 36 CORNELL L. Q. 273 (1951).

¹¹⁵ 334 U.S. 131, 136, 166 (1948).

¹¹⁶ 183 F. 2d 562, (1950), *cert. denied*, 340 U.S. 853 (1950).

¹¹⁷ *Burstyn v. McCaffrey*, 198 Misc. 884, 886 (N. Y. 1951). Mr. McCaffrey, Commissioner of Licenses of the City of New York, revoked the general license of the cinema where the disputed film, *The Miracle*, was being shown. He did this *ex privata industria*, having no business in the matter, while the proceedings before the proper authorities about the revocation of the film were pending, and was enjoined by the court in due course.

¹¹⁸ *Burstyn v. Wilson*, 343 U. S. 495 (1952).

¹¹⁹ *Id.*, 499.

¹²⁰ *Id.*, 500.

mentality for communication of ideas was then answered in the affirmative:¹²¹

It cannot be doubted that motion pictures are a significant medium for the communication of ideas.

The Court then rejected the fallacious but traditional argument that cinemas are mere places of amusement and mere business conducted for profit, in that it pointed out that there was no clear distinction between what is amusing and what is informing,¹²² and that the presence in movies of the profit element did not in any way preclude them from being at the same time a medium of ideas—no more than newspapers were deprived of this character because of the commercial element involved in them.¹²³ But, considering another aspect of the traditional argument, the Court admitted that the potentiality for evil, concededly inherent in movies, may have an effect upon the scope of restraint to be imposed upon motion picture exhibitions. Not, however, to such an extent as to make the restraint the rule and freedom the exception:¹²⁴

If there is capacity for evil it may be relevant in determining the permissible scope of community control, but it does not authorize substantially unbridled censorship such as we have here.

And reviving the decision in the *United States v. Paramount Pictures, Inc.*, case,¹²⁵ the Court concluded the major issue of the case.¹²⁶

. . . expression by means of motion pictures is included within the free speech and free press guaranty of the First and Fourteenth Amendments. To the extent that the language in the opinion in *Mutual Film Corp. v. Industrial Comm'n*, *supra*, is out of harmony with the views here set forth, we no longer adhere to it.

Developing then the question of the scope of admissible restraint, the Court said:¹²⁷

¹²¹ *Id.*, 501.

¹²² It might be added that the whole dichotomy is fallacious. These two elements are not exclusive alternatives. Consequently the fact that something is amusing does not mean that it is not informative, and therefore even under precise definitions of each of these terms, if they were at all possible, the whole argument in the *Mutual* cases concerning this issue would be invalid at any rate.

¹²³ *Ibid.*

¹²⁴ *Id.*, 502.

¹²⁵ 334 U.S. 131, 136 (1948).

¹²⁶ *Burstyn v. Wilson*, 343 U. S. 495, 495, 502 (1952).

¹²⁷ *Ibid.*

It does not follow that the Constitution requires absolute freedom to exhibit every motion picture of every kind at all times and all places.

And further: ¹²⁸

Nor does it follow that motion pictures are necessarily subject to the precise rules governing any other particular method of expression.

These rules—the Court says—vary from one type of medium to another.

But the basic principles of freedom of speech and the press, like the First Amendment's command, do not vary. Those principles . . . make freedom of expression the rule.¹²⁹

It seems that the expectation here would be that the Court should indicate, if possible, some general principle determining the basis of such admissible exceptions. But the Court proceeds to say that from the two methods of repression, *viz.*, by previous restraint and by subsequent punishment, the former deserves a condemnation even more intense than the latter,¹³⁰ although this is not to say—as the Court points out recalling the precedent in *Near v. Minnesota*¹³¹—that the liberty of the press [and its equivalents such as movies] is limited to that protection. It is further re-stated from the precedent that “the protection even as to previous restraint is not absolutely unlimited. But the limitation has been recognized only in exceptional cases.”¹³²

As we understand the Court, the text means, briefly, that the First Amendment protects communication of ideas certainly against previous restraint, and possibly against subsequent punishment. If it protects this freedom against both, the protection against previous restraint is more intense. But some previous restraint may be tolerated by the Constitution. In any event, the government carries the burden of proof that there is a good reason to impose the exception.

Under this language, the present writer would consider it indubitable that censorship as a routine practice consisting in the obligation to submit all films intended for public exhibition to any governmental organ for previous approval, is absolutely rejected by the Court. And that only in situations threatening an acute and actual danger to some vital value of an individual or of the nation, the utterance of some idea or emotion may be enjoined just as any preparation of a serious criminal act may be enjoined.¹³³ In this sense, the concept of

¹²⁸ *Id.*, 503.

¹²⁹ *Ibid.*

¹³⁰ *Id.*, 503, 504.

¹³¹ 283 U.S. 697 (1931).

¹³² In the *Near* case, p. 716; in the *Burstyn* case, p. 504.

¹³³ The doctrine of clear and present danger, *Schenck v. U.S.*, 249 U.S. 47, 48, 51, (1919) determines the conditions under which repression of utterances is legitimate. It does *not* say that even then only *subsequent* repression is meant. Previous

exception, which is the central concept of the Court's theory of limitations on the freedom to speak in its various forms, would be understood in terms of a relationship between situations and utterances. It is impossible to say what words, pictures, music or sculptures, gestures or meaningful silence can become an inherent part of an unlawful action. But it is as a part of a crime that an utterance becomes a crime, and may be enjoined as other crimes may. Any expression may become criminal if the situation is such as to make it so. And it can be enjoined in such cases. To draw a censorship statute on this principle is both impossible and unnecessary. A censorship statute is always addressed to utterances or expressions *as* utterances or expressions. However definite and limited the class of prohibited utterances may be, the censorship so established is not an exception, but a permanent arrangement which requires a regular submission of all items within its scope—all films, all books—to some censor, with all the retarding effects upon the circulation of such media of thought. On the other hand, existing criminal law can always lawfully intercept utterances which are intrinsic components of criminal deeds. And only in this sense the prevention of an expression can actually be called an exception.

Obviously, then, the precision of standards of a censorship law has nothing to do with the problem. So long as utterances intended to be made must first, *sua sponte*, be presented to the government for approval, and may be made only after governmental approval, censorship exists as a permanent, daily routine, and not as an exception. It does not matter that the class of things the censor may exclude is very small. This does not make the operation of censorship an exception. Previous restraint as an exception would exist if the mechanism of prevention operated just as it operates in all other criminal cases. The government must, through the police, establish a probable cause that an unlawful action is contemplated. A judicial warrant must be issued, and the instruments of the intended crime

restraint is justifiable on the same ground. Nobody would argue that, *e.g.*, an atomic ex-scientist could produce a film showing all top secrets and arrange for public exhibition, and that the government, knowing about it, could not stop him, and would have to be satisfied with punishing him afterwards. It is not the purpose of public order to punish evils, but to keep them out of life. The freedom of ideas in a democracy rests on the notion that ideas as such are no evil, unless evil deeds result from them directly and demonstrably. The freedom does not rest on the distinction of good ideas and evil ideas. So long as an idea remains an idea only, it is irrelevant whether it is good or evil.—We do not think that the "clear and present danger" principle does no more than allow of punishment of a man who falsely shouts "fire" in a theater so causing panic and injury. Is it not true that it would be lawful to prevent him from doing so? The court answers this in the positive: "It [protection of speech] does not even protect a man from an injunction against uttering words that may have all the effect of force." *Id.*, 52, referring to *Gompers v. Buck Stove & Range Co.*, 221 U.S. 418 (1911).

may be seized and persons arrested. So the crime is prevented.

This, we thought on the basis of the text of the opinion in the case before us, would be the Court's understanding of previous restraint as an exception. This conception would have annulled all censorship laws throughout the Union. But the rest of the opinion points in a different direction. The Court proceeds to examine whether the standards of the New York censorship statute are sufficiently definite and, perhaps, sufficiently narrow, to constitute the censorship exercised under the law an exception. It considers the word "sacrilegious," as the part of the standard which actualized in the given case, and the interpretation given to the word by the New York courts. Finding that its meaning is broad and variable, the Court concludes that a censorship exercised under such standard is not an exception.¹³⁴

This is far from the kind of narrow exception—the Court says there—to freedom of expression which a state may carve out to satisfy the adverse demands of other interests of society. In seeking to apply the broad and all-inclusive definition of "sacrilegious" given by the New York courts, the censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views with no charts but those provided by the most vocal and powerful orthodoxies. New York cannot vest such unlimited restraining control over motion pictures in a censor.

And further:

Since the term "sacrilegious" is the sole standard under attack here, it is not necessary for us to decide, for example, whether a state may censor motion pictures under a clearly drawn statute designed and applied to prevent the showing of obscene films. That is a very different question from the one now before us. We hold only that under the First and Fourteenth Amendments a state may not ban a film on basis of a censor's conclusion that it is "sacrilegious."¹³⁵

In other words, the Court understands the word "exception" not in the sense that the government may intervene only in rare cases. It only means that such a permanent intervention as is the requirement to submit all films for inspection to the government should not be exercised to eliminate too broad or too elusive a class of ideas. If the state can establish a precise definition of the class of ideas to be eliminated, and if it can show a good reason that these ideas ought to be eliminated, it may enact a statute requiring the presentation to some governmental organ of all the media which are capable of containing or transmitting these prohibited ideas. We fail to see why this power should not affect newspapers as well, or the radio, or, for

¹³⁴ *Id.*, 504, 505.

¹³⁵ *Id.*, 505, 506.

that matter, all speeches to be publicly given.¹³⁶ But this position not only does not safeguard an alleviation of the burden incumbent upon the film industry; it gives a theoretical basis for the censorship of everything else. In this respect the press was more safe under the old *Mutual* decision. The worst burden of a censorship statute does not lie in the amount of things eliminated, but in the necessity to submit everything intended for publication to the government.

In the absence of a clear statement of the Court that the requirement to submit films for inspection as a matter of regular practice and routine, itself is unconstitutional, the states could enact statutes with standards so liberal that actually every film would pass, only in order to exact revenues, a purpose not altogether alien to either the legislative or the administrative element.¹³⁷ It would not even be necessary to view the films; it would be enough to collect the money.

Yet it may be expected that the decision of the Supreme Court shall soon have the effect of abolishing the censorship laws and ordinances anyhow. From the present statutes, hardly any one employs standards less vague than the New York censorship law, and certainly the Ohio statute with its standard determined by the words "moral, educational, harmless and amusing,"¹³⁸ has no more chance to survive than the New York law had facing the rendezvous with the Supreme Court. The Ohio lower courts already refuse to apply it,¹³⁹ and it is a question why the cinemas in Ohio do not just ignore the obsolete law, which they could, we think, safely afford. In general, it will be extremely difficult to design new statutes with more satisfactory standards after the present ones have been voided.¹⁴⁰ And, which is more, the nation will hardly yearn for authoritarian devices which so luckily have been shaken off after four decades of operation which in its second half at least grew tangibly oppressive. The words of Mr. Justice Douglas, concurring in a case following the *Burstyn* decision¹⁴¹ are not only a piece of judicial opinion, but a noble exhortation. He said:

¹³⁶ If, as was said, movies have a greater capacity for evil than printed words do, direct speech, if it be an evil speech, has a greater capacity for evil than movies have.

¹³⁷ See section on "Collection of Fees," *infra*.

¹³⁸ Ohio Gen. Code §154 - 47b.

¹³⁹ *Judge Rules Out Censorship of Ohio Newsreels*, The Columbus Evening Dispatch, September 10, 1952. *Movie Wins Test of Censorship*, The Columbus Citizen, September 10, 1952.

¹⁴⁰ As was said by the court in the first *Mutual* case, " . . . it would be next to impossible to devise a language that would be at once comprehensive and automatic." 215 Fed. Rep. at 147.

¹⁴¹ *Gelling v. Texas*, 343 U.S. 960 at 961 (1952).

If a Board of Censors can tell the American people what it is in their best interest to read or to hear or to see . . . then thought is regimented, authority substituted for liberty, and the great purpose of the First Amendment to keep uncontrolled the freedom of expression defeated.

It is of interest to realize that the context in which the problem of standards in censorship was considered in 1914-15 and in which it is considered in the present cases, is different. In the earlier cases the objection was that the standard, being too vague, constitutes an undue delegation of legislative power to administrative agencies. In this connection the problem is one of procedural Due Process. But as the subject was posited at the present time, it appears that the question is as to what an extent liberty may be limited by anyone. It is no longer the question of distribution of power between the legislature and the executive branch, but the question of how far the government may go at all. It is a problem of substantive "Due Law." Suppose the legislature undertook to view every film and to determine its admissibility by a special act. Obviously it could not be said that power was unduly delegated. The only question would be whether such power resides in *any* governmental organ. On this basis, we think, the problem stands now. And the scope of an admissible intervention on part of the government has been determined by the concept of "exception." All now depends on how this term itself will be grounded. If the development of constitutional interpretation works toward an actual assimilation of motion picture film exhibitions to the circulation of the press and of the living word, the criterion, or standard, of distinguishing between the free and the prohibited expression will have to follow the general principle of clear and present danger of the *Schenck* case, *supra*. That principle need not protect the government or the political forms only, but it is broad enough to justify an intervention in case of acute and real danger to anyone, just as the criminal code itself protects not only the government but also private interests.

On the other hand, the contention may prevail that the potentiality for evil is greater in motion pictures than in circulating printed matter to such an extent as to justify a dualism in treating these two media of information, and that on this basis pre-censorship of film would be tolerated while pre-censorship of literature would not. In this case discussion would be reduced to the question what kind of topics may be excommunicated and how precise the definition must be. In any event, the burdensome duty to present films to governmental agencies before exhibition would continue if this interpretation prevailed. But as we have said, it is more likely that the Supreme Court will abolish pre-censorship altogether. First, it is difficult to find a common denominator acceptable to all trends of ethical conviction. The Court realized this fact very emphatically in its

Burstyn decision, and especially Mr. Justice Frankfurter dealt with the issue in his concurring opinion. Second, it would be "next to impossible", as we have seen, to devise a statute whose language would determine the definition of the prohibited class of ideas in a manner both comprehensive and mechanical. Third, the tendency to prohibit ideas *qua* ideas is essentially alien to democracy, and it is only on the basis of a demonstrably existing causal nexus between an idea and an action that the former will be considered as possibly criminal under the democratic theory. Fourth, subsequent prosecution of the showing of a film has anyhow the prospective effect of banning that film from further circulation if conviction is reached. Fifth, public opinion seems to be much more sensitive toward any attempted regulation of liberty now than it was at the beginning of the century.

The present situation in practice was described by Mr. Hollis Alpert recently as follows:¹⁴²

The whole question of pre-censorship, however, was not clarified by the court. Censorship boards are still free to operate, and none has gone out of business because of the Supreme Court ruling.

But we cannot imagine just on what basis the New York censorship agency operates, since according to all possible expectations the New York censorship statute, rejected by the Court on the basis of the word "sacreligious," must have fallen as a whole, and the Texas ordinance, dealt with in the *Gelling* case, as well. If these statutes are invalid, how do the respective agencies operate?

If the improbable thing happens and the Supreme Court in its future decisions sustains regulation of film exhibitions in its pre-censorship form, as a regular and everyday practice, the film industry, and the national civil liberties, have not been helped much. But it will still remain for the adherents of film censorship to fight the issue through on the interstate commerce basis, which issue indubitably will be raised again. Under the present constitutional status of motion picture business, it will be no easy task to maintain the position of the states. It is possible that Congress will say a word then.

ORGANIZATION AND PROCEDURE OF THE OHIO CENSORSHIP ADMINISTRATION

I. 1913- 1921

The following extract from the original film censorship act of 1913¹⁴³ lays down the basic features of the early organization of the censorship agency:

¹⁴² *Talk With a Movie Censor*, THE SATURDAY REVIEW, NOVEMBER 22, 1952, 21 *et seq.*

¹⁴³ 103 OHIO LAWS 399 (1913).

There is created under the authority and supervision of the Industrial Commission of Ohio a Board of Censors of motion pictures films. Upon the taking effect of this act, the Industrial Commission shall appoint with the approval of the governor, three persons . . . who shall constitute such Board . . . The Board of Censors may organize by electing one of its members as president. The Secretary of the Industrial Commission shall act as secretary of the Board. Each member of the Board shall receive an annual salary. . . . The members of the Board shall be considered as employees of the Industrial Commission and shall be paid as other employees of such Commission are paid. The Industrial Commission shall appoint such other assistants as may be necessary to carry on the work of the Board. . . . The Board of Censors may work in conjunction with any censor Board or Boards of legal status of other states as a censor congress and the action of such congress in approving or rejecting films shall be considered as the action of the Board.¹⁴⁴

The nature of the term "censor" is further specified by a determination of the function of the Censorship Board, as follows:

It shall be the duty of the Board of Censors to examine and censor as herein provided, all motion picture films to be publicly exhibited and displayed in the state of Ohio. . . .¹⁴⁵

The next provision determined the purpose of the function of the censors:

Only such films as are in the judgment and discretion of the Board of Censors of a moral, educational or amusing and harmless character shall be passed and approved by such Board . . .¹⁴⁶

The text of the law reproduced above contains an ambiguity which brought forth a major discussion soon after the law had begun to operate. The ambiguity arises from the contraposition of the clause "under the authority and supervision of the Industrial Commission" with the sentence that only films eligible according to the judgment and discretion of the Board of Censors may be approved and exhibited. Obviously the question emerges as to who is superior, whether the Industrial Commission or the Board of Censors. The question dissolves into three aspects, as follows: (1) To whom shall the petitions for the censoring of films be addressed, and (1a) to whom shall petitions for hearing be addressed. (2) Who is to conduct the hearings, and (3) whether there is an appeal from the Board to the Commission. The problem was presented to the Attorney General. In his opinion of July 31, 1914,¹⁴⁷ the

¹⁴⁴ Excerpts from OHIO GEN. CODE §§ 871-46, 871-50; 103 OHIO LAWS 399.

¹⁴⁵ OHIO GEN. CODE § 871-48

¹⁴⁶ OHIO GEN. CODE § 871-49.

¹⁴⁷ 1914 Ohio Atty. Gen. Op. 1048.

Attorney General sustained the supremacy of the Board of Censors on all these counts. He said:¹⁴⁸

While this act in plain and unambiguous language places the Board of Censors under the supervision of the Industrial Commission, and designates its members as employees thereof, nevertheless the act contains language, which, in my judgment, substantially modifies and limits the broad expressions [referred to]. It will be noted that it is made the express duty of the censors to examine the films to be publicly exhibited, provision being made for the submission of these pictures to the Board, which shall approve only such films as are in its judgment of a moral, educational, or amusing and harmless character. Under language such as this the only conclusion at which one can arrive is that the Board of Censors is to exercise its judgment and discretion in determining whether the films meet with the statutory requirements. There is nothing to indicate that the aesthetic taste or moral perception of any other Board or Commission is to be substituted for that of the censors, nor is there anything to indicate that such censors act purely in a ministerial capacity as agents of the Industrial Commission when they pass upon the films . . . If the General Assembly had intended to authorize review of the action of the Censor Board by any other body, it seems to me that there would have been some distinct statement to that effect in the statute, especially when provision is made for action in conjunction with any other censor boards. If the action were to be jointly with or under the control of the Industrial Commission, apt language to accomplish this purpose would, no doubt, have been employed. It is worthy to note that the only public servants who are referred to in the conferring of power to approve or disapprove films, is the Board of Censors or the Censor Congress. This is clearly and definitely stated in unequivocal language, and the discretion and judgment of such Board seem to be the determining features in the authorization of the exhibition of motion pictures

In the sequel, the Attorney General further said:¹⁴⁹

It is plain that there was no aim or desire on part of the General Assembly to require dissatisfied persons to file a petition for hearing with the Industrial Commission.

It was, however, admitted in his statement that:¹⁵⁰

It may well be, and probably is true, that the Industrial Commission has a certain degree of authority and supervision over the censors, and in that respect the members of that Board are to be treated as employees of the Commission with reference to their official conduct and certain phases of their ministerial work . . .

¹⁴⁸ *Id.*, 1049.

¹⁴⁹ *Id.*, 1050.

¹⁵⁰ *Ibid.*

There is no difficulty in visualizing that one of these bodies was supreme in some respects, and the other body in other respects. However, granted that the Board of Censors has the final administrative discretion in appraising the content of a film, it should not be overlooked that this issue was not the only one to determine the legal status of the film. And concerning other issues, the Industrial Commission might well have been competent to conduct hearings. Moreover, it is quite conceivable that the petitions for censorship and for hearings might have been addressed to the Industrial Commission even in respect to issues which in the merits were to be decided by the Board of Censors. The literal meaning of the law was that persons dissatisfied with an order of the Board should have the *same* remedy as those aggrieved by an order of the Commission,¹⁵¹ which indicates that the petition for hearing should be filed with the *Commission*.¹⁵² And the Industrial Commission represented the Board of Censors toward external parties in many other situations.¹⁵³

As a matter of prudence, however, it seems that the concentration of film censorship duties in the Board of Censors was a wise measure. On the basis of this action of the Attorney General, the Board of Censors developed a distinct identity as a rather independent administrative unit and retained its status until the reorganization in 1921, although its character as a subdepartment of the Industrial Commission was manifested in several formal respects.

The correspondence with the Attorney General was conducted partly by the Board of Censors and partly by the Industrial Commission.¹⁵⁴ In the reports of the Secretary of State to the Governor, information about the Board of Censors was a part of the report on the Industrial Commission.¹⁵⁵ The members of the Board were nominated by the Industrial Commission (with the approval of the governor).¹⁵⁶ The Board of Censors worked in the rooms and with the equipment furnished by the Industrial Commission,¹⁵⁷ and had a secretary in common with the Commission.¹⁵⁸ In its superior capacity, the Commission might have issued rules for the conduct of

¹⁵¹ Section 8 of the 1913 Censorship Act, *supra*.

¹⁵² OHIO GEN. CODE § 871-27 (1913).

¹⁵³ *Infra*.

¹⁵⁴ The first letter to the Attorney General from the censorship administration was written by the Industrial Commission: 1914 Ohio Atty. Gen. Op. 1048; the second by the Board of Censors: 1914 Ohio Atty. Gen. Op. 1375; the third by the Commission: 1915 Ohio Atty. Gen. Op. 465; the fourth likewise: 1915 Ohio Atty. Gen. Op. 1522; the fifth likewise: 1917 Ohio Atty. Gen. Op. 737; after this year, no more advisory opinions were asked from the Attorney General by the censorship agency until the new Department of Education took over the censorship duties.

¹⁵⁵ OHIO STATISTICS, 1913 - 1921.

¹⁵⁶ 103 OHIO LAWS 399; OHIO GEN. CODE § 871-46.

¹⁵⁷ OHIO GEN. CODE § 871-47 (1913-1920).

¹⁵⁸ *Ibid.* Cf. 103 OHIO LAWS 99; OHIO GEN. CODE § 871-14 (1913).

business of the Board of Censors,¹⁵⁹ for instance concerning the keeping of records.¹⁶⁰ The Commission also could decide how many assistants shall be furnished the Board of Censors.¹⁶¹ On the other hand, the "Authority and Supervision" clause worked to the effect of strengthening the position of the Board toward external parties. For instance, the orders of the Board of Censors have been said¹⁶² to have the same status as those of the Industrial Commission, i.e., they enjoyed the presumption of being *prima facie* reasonable and lawful.¹⁶³ Further, it is conceivable that the Board of Censors might have employed, by analogy with the Industrial Commission, inspectors entitled to enter freely the establishments under the jurisdiction of the agency, i.e., cinemas, to control exhibitions.¹⁶⁴ In fact such inspectors were *not* employed for the purpose of the censorship board.¹⁶⁵

In law suits filed against the censorship agency, the Industrial Commission, not the Board of Censors, was the *ex lege* defendant.¹⁶⁶

When the Board of Censors began its work in 1913, it had only two members—Mr. Harry E. Vestal and Miss Maude M. Miller. There was one vacancy. The auxiliary personnel consisted only of three persons: an operator, a stenographer, and an assistant stenographer.¹⁶⁷ By the appointment of Mr. W. R. Wilson, the Board became complete in 1914 and its further personnel grew from three to seven.¹⁶⁸ There was a custodian of films, two operators, four stenographers. As the members of the Censorship Board were appointed, respectively, for one, two and three years,¹⁶⁹ Mr. Vestal was replaced by Mr. Charles G. Williams in 1915¹⁷⁰ and Mr. Wilson by Mr. Maurice S. Hague in 1919.¹⁷¹ For some of the years of this early period there is no report in the Ohio Statistics. It seems that the maximum number of the technical personnel of the Board of Censors was nine—in 1917¹⁷² and 1918¹⁷³ Then it decreased.

¹⁵⁹ 103 OHIO LAWS 102; OHIO GEN. CODE § 871-22 (7) (1913).

¹⁶⁰ OHIO GEN. CODE § 871-33.

¹⁶¹ OHIO GEN. CODE § 871-47.

¹⁶² *The Epoch Producing Corp. v. Harry L. Davis*, Mayor of Cleveland, 19 Ohio N.P.N.S. 465.

¹⁶³ *Id.*, 481. OHIO GEN. CODE §871-25 (1913).

¹⁶⁴ 103 OHIO LAWS 100; OHIO GEN. CODE §871-20 (1913).

¹⁶⁵ 1917 Ohio Atty. Gen. Op. 737.

¹⁶⁶ 103 OHIO LAWS 107, 400, 401; the "*Mutual*" decisions, *supra*.

¹⁶⁷ 1913 OHIO STATISTICS 354.

¹⁶⁸ 1914 OHIO STATISTICS 624.

¹⁶⁹ 103 OHIO LAWS 399.

¹⁷⁰ 1915 OHIO STATISTICS 275.

¹⁷¹ 1919 OHIO STATISTICS 622.

¹⁷² 1917 OHIO STATISTICS 624.

¹⁷³ 1918 OHIO STATISTICS 314.

II. 1921 to PRESENT

In spite of certain organizational modifications which took place in 1933, 1935 and 1943, the era from 1921 to the present time forms a unity which is discernible by a fundamental criterion from the previous period, the period of 1913 to 1921. The main mark is that the Board of Censors lost its distinguished position and was devolved upon a secondary plane. It will be indicated in the course of the discussion that it is not certain whether such complete depreciation of the Board was actually the will of the law at all times between 1921 and 1952; but such was the outcome in practice and the language of the law is largely responsible for it. It will be seen that in certain phases of the development, the language is demonstrably ambiguous and in contradiction with itself. Tending toward simplification, as is usually the effort in practice, official interpretation continued the impulse which the evolution received in 1921 and which pointed toward a radical lessening of the Board's authority and toward the concentration of all the powers of film censorship in the person of the Director of the Department of Education. The distinct personality, and the independent authority which the Board had enjoyed under the Industrial Commission was lost, and does not exist now.

The mechanism of the transformation was as follows:

The Law of 1921.

The Administrative Code of 1921¹⁷⁴ repealed¹⁷⁵ the two most fundamental sections of the original censorship law of 1913 on which the existence and main organizational structure of the Board rested—Sections 871-46 and 871-47 of the General Code of 1913. Duplicating the repeal, the administrative code stated once more *express verbis* that:

The Board of Censors of motion picture films under the authority and supervision of the Industrial Commission of Ohio [was] abolished.¹⁷⁶

The law then proceeded to enact the following section:¹⁷⁷

An advisory Board of three members is hereby created in the Department of Education, to be known as the Advisory Board of Film Censorship. The members of the Board shall be appointed by the Governor, to serve during his pleasure, and shall receive no compensation, but shall be entitled to their actual and necessary expenses incurred in the performance of their official duties. Such Board shall

¹⁷⁴ 109 OHIO LAWS 103.

¹⁷⁵ *Id.*, 105, 132 (Section 3 of Act).

¹⁷⁶ *Id.*, 111; OHIO GEN. CODE § 154-26 (1921).

¹⁷⁷ *Id.*, 122; OHIO GEN. CODE § 154-47.

assist and advise the Department of Education in the examination and censorship of motion picture films.

Combining with the next preceding provision is the following text:¹⁷⁸

The Department of Education shall have all powers and perform all duties vested by law in the Industrial Commission of Ohio and the Board of Censors of motion picture films by sections 871-48 to 871-53, both inclusive, of the General Code.

Further precision is obtained from another part of the law:¹⁷⁹

The Director of each department shall, subject to the provisions of this chapter, exercise the powers and perform all the duties vested by law in such department.

The office of the Director of the Department of Education belongs *ex lege* to the person who occupies the office of the Superintendent of Public Instruction,¹⁸⁰ and the powers which so far resided in the superintendent now pass upon the Department of Education,¹⁸¹ and from there center in the hands of the Director *qua* director,¹⁸² which makes the office of the superintendent an exclusively nominal one. Concerning film censorship, nothing passes from the superintendent of Public Instruction upon the Department of Education, because the Superintendent had no powers relative thereto. The censorship powers pass from the *Industrial Commission* and the *original Board of Censors* upon the *Department of Education* by virtue of the quoted text¹⁸³ and center at least formally in the hands of its Director.¹⁸⁴ If section 154-48 General Code¹⁸⁵ is sometimes quoted as relevant for the construction of the film censorship laws it is a meaningless quotation.

The Director of Education has in his department a system of instrumentalities through which his will may operate. He may establish, with the approval of the Governor, divisions within his department and distribute the work of the department among them.¹⁸⁶ The office of the Chief of the Division of Film Censorship is created in the Department of Education,¹⁸⁷ and he shall be the head of the Division.¹⁸⁸ The Director of Education further may,

¹⁷⁸ 109 OHIO LAWS 121, 122.

¹⁷⁹ 109 OHIO LAWS 106.

¹⁸⁰ *Ibid.*

¹⁸¹ 109 OHIO LAWS 122. OHIO GEN. CODE § 154-48.

¹⁸² OHIO GEN. CODE § 154-3.

¹⁸³ OHIO GEN. CODE § 156-46.

¹⁸⁴ 109 OHIO LAWS 106: "The director of each department shall . . . exercise all the powers and exercise all the duties vested by law in such department."

¹⁸⁵ 109 OHIO LAWS 122.

¹⁸⁶ 109 OHIO LAWS 107.

¹⁸⁷ *Ibid.*

¹⁸⁸ OHIO GEN. CODE § 154-8.

with the approval of the governor, discard a division again and presumably keep the office unoccupied.¹⁸⁹ The director may prescribe regulations for the government of his department, the conduct of his employees, for the performance of its business and for the custody, use and preservation of records, papers, books, documents and property pertaining thereto.¹⁹⁰ The Director also may, with the approval of the Governor, establish and appoint advisory boards to aid in the conduct of the work of his department or of any division or divisions thereof.¹⁹¹ The law stipulates that such advisory boards shall exercise *no administrative function*, and their members shall receive no compensation but shall receive their actual and necessary expenses. The Director of Education and the Chief of the Division of Film Censorship are directed to devote their entire time to the duties of their office, and are prohibited from holding any other position of profit.¹⁹²

Unlike the advisory boards authorized by section 154-16 of the General Code of 1921, the Advisory Board of Film Censorship is established directly by the law.¹⁹³

It will be observed that the law does not say that it will be the duty of the Advisory Board to examine and censor films, and that this duty was assigned the Department of Education as such—*supra*.

Great importance attaches to Section 154-24 of the General Code,¹⁹⁴ whose general intent is further supported by the next following section of the act. In part, Section 154-24 reads as follows:

Every person, firm and corporation shall be subject to the same obligations and duties and shall have the same rights arising from the exercise of such rights, powers and duties as if such rights, powers and duties were exercised by the officer, board, commission, department or institution designed in the respective laws which are to be administered by departments created by this chapter.

It was this section that was relied upon in determining the question whether the remedial rights—the right of petition for hearing and that of judicial review, were or were not abolished by the dissociation of the censorship administration from the Industrial Commission.¹⁹⁵

These, summarily, are the major changes the law of 1921 effected:

¹⁸⁹ OHIO GEN. CODE § 154-8 (third paragraph). At the present the division has no chief. Information from the Department of Education.

¹⁹⁰ OHIO GEN. CODE § 154-8 (fourth paragraph).

¹⁹¹ 109 OHIO LAWS 108; OHIO GEN. CODE § 154-15.

¹⁹² OHIO GEN. CODE § 154-16.

¹⁹³ 109 OHIO LAWS 122; OHIO GEN. CODE § 154-47. Quoted *supra* at note 177.

¹⁹⁴ OHIO LAWS 110, 111.

¹⁹⁵ *Infra*.

1. The duty to examine and censor films passed from the board upon the Department of Education, then created.
2. It centered in the hands of its Director.
3. The Board of Censors was renamed "Advisory Board of Censorship."
4. The duty of the Board was determined by the words "to advise and assist" the Department of Education in the censorship function.
5. The censors ceased to be regular employees and lost their salaries.
6. However, their appointment was trusted directly into the hands of the Governor of the State himself.
7. Their tenure which had been fixed by law, was placed into the discretion of the governor.
8. A new unit connected with the film censorship came into existence, *viz.*, the "division of film censorship," under a statutory official called "the chief of the division of film censorship," who was to be paid. Also, the other employees of the division, being employees of the Department of Education, were regular civil servants.
9. Note that the Advisory Board of film censorship was created directly by the law, while other Advisory Boards could be created by the Director of Education in his discretion.

In an opinion of April 13, 1922,¹⁹⁶ the Attorney General answered a question of the then Director of Education, Mr. Vernon Riedel, about the authority of the latter in film censorship matters. After having stated the text of the law, essentially as herein above, the Attorney made his deductions:

In view of the foregoing it is believed to be clear that all the powers and duties imposed upon the Board of Censors under the provisions of Sections 871-48 *et seq.* are now imposed upon the Department of Education, which in the final analysis, by reason of the requirements of Section 154-3, *supra*, is the equivalent of saying that such powers and duties are in the Director.

The opinion further states that the Director may delegate these powers among the employees of his department but that he is himself finally responsible for every action of his Department:

Power is given to the Director to delegate his power and to supervise and direct the activities of the Department. However, as above indicated, the Director must assume the sole responsibility for the actions taken in the name of the Department of which he is executive and managing head.

¹⁹⁶ 1922 Ohio Atty. Gen. Op. 269.

And the following statement is made about the function of examining the films in special:¹⁹⁷

Theoretically speaking [which here means, practically speaking], the judgment referred to, in legal contemplation, must be reposed somewhere. It is obvious that the Department of Education, in the literal and technical sense, as an inanimate entity cannot exercise judgment and discretion, but rather the department as such is the instrumentality through which the mind of the Director functions. Stripped of all unnecessary verbiage, logic compels the conclusion that the Director must exercise such judgment and discretion. However, as is apparent from the statutes heretofore quoted, the Director may base his conclusions upon such premises and advice as to him seem proper.

The position of the Chief of the Division of Film Censorship is then considered, as follows:¹⁹⁸

. . . the Chief of the Division holds office at the will of the Director, and is required to perform the duties under the direction and supervision of the Director. Nowhere in the law are there any powers conferred upon the Chief, as such, independent of the supervisory prerogatives of the Director. The Director may prescribe regulations for the government of the Department (Section 154-8). It therefore is clear that the Director may give unlimited credence to the judgment or opinion of the Chief of the Division, or he may limit the same to the extent that he believes is essential for the best interests of the Department.

Attention is then turned to the function of the Advisory Board of Film Censorship, and the Attorney, upon quoting Section 154-47 of the General Code,¹⁹⁹ says this:²⁰⁰

It is assumed that the legislature in the use of the words "assist and advise" in the above enactment intended the common and ordinary meaning of such words to be applied in the interpretation of the statute. It is clear that the powers of this Board are limited to assisting and counseling the Department of Education. Such Board exercises no executive or managing functions. It is evident that in this provision it was the intent of the legislature to create a Board which would attract those of philanthropic inclinations, whose very acceptance of such an unremunerative position would be indicative of a sincere desire to be of unselfish service to the public, in the belief that the counsel of such a Board would be a distinct benefit to the Department. This Board has power to advise, aid, counsel and inform. How-

¹⁹⁷ *Id.*, at 271.

¹⁹⁸ *Ibid.*, *in fine*.

¹⁹⁹ "Such board shall assist and advise the department of education in the examination and censorship of motion picture film."

²⁰⁰ *Id.*, 272.

ever, the final powers and responsibility rest with the Director, notwithstanding the Advisory Board. The Director may give such weight to the advice of such Board as in his opinion the facts warrant. He may regard the judgment of the chief of the division as being superior to that of the Advisory Board, or he may regard the judgment of the Board supreme. Undoubtedly the Director, under Section 154-8, could make a rule relative to his policy in this regard—that is to say, the Director could adopt a regulation in which he could refer films under consideration to the Advisory Board and take its opinion as the basis of his final action. Such regulation, however, would be subject to change at will, and as heretofore pointed out, regardless what action is taken, the Director assumes responsibility.²⁰¹

Sustaining the Attorney General's view on the supremacy of the Director of Education, the Supreme Court of Ohio called the latter "the censor *ex officio*."²⁰² However, the court insisted that an examination or inspection of every film submitted was a necessary requirement of due process under the laws, and reprimanded the Director for failure to materialize this point. The court said:

It is conceded that the Director of Education not only failed to procure the advice and assistance of this Board but predicated his refusal of the application for exhibition not upon an examination of the film, but upon what he terms "his general knowledge of its character." It is manifest that [the applicable] sections of the law, governing film censorship, were not complied with.

Presumably it would have been lawful for the Director to procure the advice of the Advisory Board of Film Censorship, which Board should have previously inspected the film, and then reject such advice; or also, to view the film himself, and reject it then, without procuring any advice. Or, on the interpretation of the Attorney General, the Director also might receive the advice from the Chief of the Division of Film Censorship or any assistant and exercise his own discretion then.

It seems that whichever method is preferred, the result is always the same, viz., the Director can do as he pleases.

That such an unusual scope of authority of one man over the whole volume of cinematographic culture should appear somewhat surprising even to the Director himself seems to be manifested by the fact that he decided to assure himself by requesting the opinion of the Attorney General, as we have seen he did. And while the words of the law afford a rather solid basis for the view taken by the attorney and reflected in the decision of the court, there are some

²⁰¹ *Id.*, 272

²⁰² *State ex rel. Midwestern Film Exchange v. Clifton*, 118 Ohio St. 91 (1928).

further facts in the law which should be confronted with the argument built on that basis.

It may well be, and it is difficult to deny, that the title of the "censor *ex officio*" attaches to the Director of Education, as was said by the supreme court in a full or at least in partial corroboration of the Attorney's position. For that matter, the Industrial Commission in its time might also have been so styled. This formal prerogative did not secure for it, however, the exclusive right to be the final arbiter over the idea content of the films or to issue the final orders relative thereto.

The most conspicuous trait in the whole conception of the film censorship administration of 1921 (and after) is the fact that the advisory censors became appointees of the governor and that they were to remain in office by virtue of his will. They are not appointed, as is the Chief of the Division of Film Censorship, by the Director of Education, nor are they revocable by the latter. And they are not employees of the Department of Education, although the Board as a quasi-administrative unit is located in that department. While the Chief of the Film Censorship Division is, in the correct words of the Attorney General, an instrumentality of the will of the Director of Education, the members of the Advisory Board of Censorship are not.

In respect to their appointment, the advisory censors can pride themselves with an origin as distinguished as the Director of Education himself, for they, too, are appointed by the governor.

This being equal, the difference is that the Advisory Board of Censorship is an agency specialized for the function of evaluating motion picture films, whereas the Director is not and cannot be.

Concerning, on the whole, the opportunity of any of them, the Advisory Board on one hand and the Director on the other, to devote time to the viewing of films, it is difficult to say whether the Director or the advisory censors have less time for it. The former has dozens of other duties, the latter must perform some other profession to earn livelihood.

The advisory censors cannot sit for the censorship purposes all the time; nor can the Director. But when the censors do sit, they sit, unlike the Director, as a specialized agency.

The question is whether it can be imputed to the legislature that it should have created such an agency and, moreover, of a standing directly related to the governor, and at the same time intend that the findings of the agency should enjoy precisely the same authority as the judgment of any one employee of the Department of Education whom the Director or the Chief of the Film Division may assign to examine a certain film,²⁰³ and no more.

²⁰³ In a pamphlet edited by Mr. Vernon M. Riegel, Director of Education, and issued probably in 1925, the process of censoring was described as follows:

It is not without some difficulty that this proposition gains acceptance. A different view seems to be agreeable to the law at least as much. Perhaps it was the intent of the legislature to create a board of irregular and exceptional standing, not to be burdened with a permanent routine of looking at every film which is submitted for inspection, but to be ready to act in controversial cases and then to act with the authority of a board of specialists whose judgment is *ex officio* of a higher quality than that of anyone else. And unless some such conception is right, one might really ask why the Advisory Board of Censorship exists at all.

One of the declared purposes of the enactment of the administrative code of 1921 which brought the new censorship organization into existence is clearly stated in the law itself:²⁰⁴

. . . The state service in the appointive state departments, shown by said investigations to be wasteful and inefficient, is becoming increasingly demoralized . . .

It is difficult to see what amelioration of such conditions could be expected from the creation of another useless body to gravitate around the Department of Education, but to be unable to make decisions in the only function for which it was created.

If the will of the Director of Education is always to prevail, the Division of Film Censorship, which is an instrumentality of that will, is more than enough to perform the task of assisting the Director. Why create three more distinguished, but helpless assistants to be appointed by the governor but to be helpless against the Director?

These considerations seem to cast some doubt upon the interpretation by which the Attorney General in 1922 construed the position of the Advisory Board of Film Censorship. It is possible to suggest that the Advisory Board was intended to be in some sense a continuation of the earlier Board of Censors, with the difference that the former Board was one of regular service and therefore paid, while the later Board was not a part of regular service and its members were not employees. The new arrangement, introduced in 1921, makes the occurrence of the findings of the Board less frequent because the Board can convene rarely; but when rendered, the findings lawfully enjoy, in our opinion, the same authority as those of the Board of Censors had enjoyed before 1921.

The word "advisory" is but a small obstacle to the suggested

"The pictures are censored by two assistants with the aid and under the direct supervision of the Director of the Department of Education. At present the Division also employs three clerks who take care about the financial and clerical work, two operators and a shipping clerk—all civil service appointees." No word is said about the Advisory Board of Censorship.

²⁰⁴ 109 OHIO LAWS 105, 134.

conception. There have been other "advisory" boards with enforcing powers, supreme on the administrative level in their own field of action. If the words of the 1913 law, "under the authority and supervision of the Industrial Commission," did not reduce the Board of Censors to an actually subordinate position, there is no reason to suppose that the words "advisory" or "assist and advise," to be found in the law of 1921, must do it. And the function of censorship is not any less located in the Department of Education, where the new law transferred it,²⁰⁵ if it is vested specifically in a particular unit of that department.

The development of 1933 seems to afford an additional warrant for the conception here suggested.

The Law of 1933

It is surprising to observe that the act of 1933 contains the following enigmatic provision:²⁰⁶

It shall be the duty of the Board of Censors to examine and censor as herein provided all motion picture films

For as we know, the Board of Censors was abolished in 1921, by an express repeal of the section which had created that board in 1913. Ever since 1921, there existed an Advisory Board of Film Censorship. It is not primarily the word "advisory" which causes the difficulty. It is the fact that without any repeal of the 1921 section which made it implicitly, not *expressis verbis*, the duty of the Department of Education²⁰⁷ to examine and censor the films, this new law of 1933 uses the old language of 1913,²⁰⁸ saying again that it will be the duty of the Board of Censors to examine and censor the films.

The act does not make the impression of a reorganization act. Rather it is quite obvious that its purpose has been to exempt newsreels from censorship, and nothing more. Therefore the law stands as a powerful witness that the legislator actually never intended to assign the duty to censor films to the Department of Education at large, and to let it center in the hands of its Director. In 1921, it was said that the Advisory Board of Film Censorship would assist and advise the Department of Education *in* the examination and censorship of such films. But obviously, this "in the examination and censorship" can be understood to mean that the Board will assist and advise the department *in that it will censor and examine* the films, as if instead of *in* the sentence contained the word *by*, and read, in whole,

²⁰⁵ 109 OHIO LAWS 121, 122; OHIO GEN. CODE § 154-46.

²⁰⁶ 115 OHIO LAWS 199; OHIO GEN. CODE § 871-48.

²⁰⁷ 109 OHIO LAWS 121, 122; OHIO GEN. CODE § 154-46.

²⁰⁸ 103 OHIO LAWS 399, 400; OHIO GEN. CODE § 871-48.

"Such Board shall assist and advise the Department of Education by examination and censorship of motion picture films."

However, the possibilities of this text remained unnoticed. No judicial decision, no opinion of the Attorney General is on the record to indicate that the problem actually was recognized as a problem. The status quo ante was continued. But another topic of interest was to arise soon.

The Law of 1935

Two years later, in 1935, a significant change entered the language of the law by a new enactment. Unlike the law of 1913, which located the censoring function in the Board of Censors,²⁰⁹ unlike the law of 1921 which vested it with the Department of Education,²¹⁰ and unlike the law of 1933²¹¹ which again uses the language of 1913, this new law of 1935 provides that:²¹²

It shall be the duty of the * * * *division of film censorship of the Department of Education* to examine and censor [* * *] all motion picture films * * *²¹³

Under such language there is a reason to assert that the part of the law of 1921 which transferred the censorship duties upon the Department of Education at large, are amended by this act in behalf of a provision allocating these duties upon a specific unit in that department.

It still remains true that the Director of Education has all the powers of the Department, but it is a question whether powers vested by law in a specific unit of such department, and not in that Department as a whole, concentrate in the Director's hands as readily as do those which are in terms of the law vested in the Department at large.

It is a question whether under such circumstances the Director could abolish the Division of Film Censorship, or leave the post of its chief a vacancy; and whether under the circumstances the opinion of such chief of the film division could be overruled by the Director of Education as naturally as it can be overruled when the Director of Education is *expressis verbis* the censor.

Possibilities of construction are numerous here, but in effect

²⁰⁹ 103 OHIO LAWS 400.

²¹⁰ 109 OHIO LAWS 121.

²¹¹ 115 OHIO LAWS 199.

²¹² 116 OHIO LAWS 100; OHIO GEN. CODE § 871-48.

²¹³ Italics and asterisks are a part of the text of the law, except the asterisks in the bracket.

nothing changed in the course of the eight years that this act was valid.²¹⁴

The Law of 1943

The new basis of film censorship in Ohio as it was created by the 1943 recodification act consisted of ten sections.²¹⁵ All previous statutes relative to film censorship were repealed²¹⁶ by the new act. According to the 1943 law, there exists, as before, the Division of Film Censorship in the Department of Education. But no mention is made about the Chief of the Division of Film Censorship.²¹⁷ The duty to examine and censor films is incumbent upon the Department of Education.²¹⁸ The standard²¹⁹ under which films are appraised is identical with the traditional one of 1913, which was never changed. The discretion exercised under this standard is vested in the Department of Education.²²⁰ The Department is authorized to organize with censorship agencies of other states into a censor congress, as the Board of Censors had been in its time (1913-1921). Section 154-47c.

Other sections provide for arrangements concerning the use of the revenue funds collected from the film censorship,²²¹ for sanctions threatened for the violation of the law,²²² for the jurisdiction of courts in criminal prosecutions,²²³ and for remedial proceedings on civil basis.²²⁴ Lastly, an advisory board of three members is created, "to be known as the Advisory Board of Film Censorship."²²⁵

With the exception that the administrative remedial hearing was abolished, the 1943 recodification continues the state of matters which developed under the 1921 law.

The following survey shows the several shifts in the language of the law locating the function of censoring in the various units of the administrative departments:

1913: It is the duty of the Board of Censors to examine and censor motion picture films.

²¹⁴ Repealed in 1943.

²¹⁵ OHIO GEN. CODE §§ 154-47, 154-47a, 154-47b, 154-47c, 154-47d, 154-47e, 154-47f, 154-47g, 154-47h and 154-47i.

²¹⁶ They were sections 154-47, 871-48, 871-48a, 871-49, 871-50, 871-51, 871-52, 871-52a, 871-52b and 871-53 of the Ohio General Code.

²¹⁷ OHIO GEN. CODE § 154-47a. The function is performed by a "supervisor" who technically is one of the "assistants" in the division of film censorship.

²¹⁸ OHIO GEN. CODE § 154-47.

²¹⁹ OHIO GEN. CODE § 154-47b.

²²⁰ OHIO GEN. CODE § 154-47b.

²²¹ OHIO GEN. CODE § 154-47a.

²²² OHIO GEN. CODE § 154-47e.

²²³ OHIO GEN. CODE § 154-47g.

²²⁴ OHIO GEN. CODE § 154-47h.

²²⁵ OHIO GEN. CODE § 154-47i.

1921: It is the duty of the Department of Education, i.e., of its Director.

1933: It is the duty of the Board of Censors.

1935: It is the duty of the Division of Film Censorship.

1943: It is the duty of the Department of Education, i.e., of its Director.

If divergent interests agitated the agency, the ambiguities of the language of the law could be exploited to sharpen the conflicts. But as the situation actually has been, little difficulty was caused by the uncertainty inherent in the law. Throughout the history of the Ohio film censorship, it seems that the spirit of good will and cooperation existed within the departments participating in the application of the censorship laws, and at the present time the Director of Education, his Division of Film Censorship, and the Advisory Board, cooperate in harmony.

THE PROCEDURE SPECIALLY*

The text that presently follows states briefly the main steps which together constitute the civil (non-criminal) film censorship procedure. The main problems and the basic concepts relative to each step are also indicated, and numbers are assigned to every major concept, corresponding to the omitted paragraphs.

The first step of the procedure is (1) the *presentation* of a film to the censorship administration, together with the (1a) payment of fees. The physical act of presenting the film or, its delivery, stands, legally, for (2) an *application*, which actually is composed of two applications: (a) that the film be *accepted for censoring*, and (b) that

* EDITORIAL NOTE. As originally submitted, the article contained a documented analysis of each specific step in the censorship procedure. It was necessary to omit this part for reasons of space. To maintain continuity, a syllabus of the discussion was prepared by the author and is presented in the instant text. However, four of the original paragraphs have been retained and follow upon the present part. The discussion of the Application for Censorship was maintained because of some technicalities of interest. The analysis of Judicial Review proceedings deals with certain problems of procedure not yet satisfactorily settled. The statement on Collection of Fees is of practical interest; and the part which deals with the Censorship of Spoken Language was included because spoken language accompanying the pictorial track is that part of film which is most immediately "speech" in the constitutional sense.

Some overlapping and perhaps some other formal inconsistencies have arisen as a result of the changes made.

it be *approved for public exhibition*. These two elements should not be fused into one. A film may be entirely acceptable under the censorship standards and yet it might be incapable of being legally passed for the reason that it cannot be a subject of application. In this case the film is returned not as a disapproved one, but as one on which the agency shall not pass judgment. It is only upon the lawful receipt of the application for censoring that the application for approval is to be considered, and only then the film is judged in its merits and either approved or disapproved. The final order passed upon the merits of the film constitutes the content of the film a *res judicata* at least for some time (until social norms of morality change), whereas the rejection of the application for censoring, as distinct from that for approval, does not prejudice the content of the film in this manner. If the film was accepted for censoring, it is (3) *censored* in that it is (3a) *viewed* under the (3b) *statutory standards*. The viewing of films by the agency is an indispensable part of the due process of law under the censorship statutes, and an order based on mere general knowledge of the subject of the film is not a valid order. The courts will declare such procedure void and remand the case for proper proceedings.

But since the early days of the censorship practice, although not from the very beginning, it has been lawfully possible that the examination of films be done by assistants to the official censors, if they worked under the supervision of the latter. Before the change of 1921 these assistants worked under the Board of Censors and it seems that they developed from the stenographers employed in the office. After 1921 the assistant censors have been selected from the Division of Film Censorship in the Department of Education and have been usually two in number. The Advisory Board of Film Censorship is called upon in controversial cases. Its judgment is considered not binding upon the Director of Education but it has been indicated that the latter usually complies with the recommendation. The standards under which a film is to be appraised are stipulated in the censorship statute. The standard prescribes affirmatively what films may be passed, not negatively what films ought to be prohibited. Only such films as are in the judgment and discretion of the board of a moral, educational, or amusing and harmless character, may be passed and approved by the administration. While approval will be denied if a film contravenes the standard on any of these counts, the withdrawal or revocation of a permit previously given is possible if in the judgment of the agency "public welfare requires it." Contrary to the first impression that the agency has broader discretion in revocation of a given permit than in original rejection of the film, it has been rightly pointed out that such could not have been the purpose of the legislature. The standard is the same. The presence of the provision enabling revocation indicates that the legislature contemplated one or both of

two types of situation. First, that the censorship agency may have made an error in its original order. Second, that a film which originally was satisfactory became unacceptable as a result of a change in the social situation in which it is to be exhibited. In the first instance the order of revocation is declaratory; in the second, constitutory.

Films once harmless may cause breach of peace in a new situation of tensions, and films once considered immoral may become a current means of education later (e.g., those dealing with pregnancy.)

In 1950 the censor attempted to ban a film previously approved, stating that one of the principal actors of the film incurred social disgrace, thus rendering the film itself unacceptable. The Attorney General rebuked the attempt and said that it would be an abuse of discretion to do so, because only the film itself was subject to censorship. Sympathetic as is the opinion of the Attorney General and debatable as is the fervor of the censor, it is a part of our analysis to contend that the censor was not necessarily off his right. It is true that the film, not the actors or directors and producers, are subject to censorship. But the educational and moral value of a film is a joint product of (a) the content of the film and (b) the situation in which it is to be shown. Theoretically speaking it is quite possible that if a part of a population entertains passionate feelings of hatred (or the like) toward someone, any mention of the hated person may cause disturbances of peace or irritation of the "moral" sense of the people. And if the vehicle of such presentation of the disliked person is a film, then the film itself may become unacceptable under the censorship standard because it is no longer harmless. In fact such situation did *not* exist when the censor attempted the action referred to. But under the statutory clause he is the sole judge of what public welfare requires, and has discretion in this field. To the extent that discretion exists, it is by definition incapable of being abused. The censor, we think, could have acted in this case as he pleased. The courts would not have found grounds to reverse him. If it be said that such an action would be undemocratic, the answer is that it is a problem whether censorship itself is democratic; but this is a question of political philosophy with which we have nothing to do at the time.

For the Attorney General to have said that an element which is not inherent in the film itself cannot determine the film's acceptability under the censorship standard, is an expression of a rigidity which prevents the finding of the correct principle. The same rigidity worked toward an opposite effect at an early stage of the censorship practice. The question then arose whether a film unlawfully transported could be approved by the Ohio agency. The Attorney General said at this occasion that whole books could be written to prove that a film unlawfully transported cannot be either moral or educational or harmless. But no amount of books can prove this. The fact is that such a

film can very well be moral and educational and harmless, and in most cases the manner of its transportation will be unknown to the audience or if known, will be ignored. But still such manner of transportation is not *necessarily* irrelevant, and under circumstances a combination of various elements could produce a situation in which the showing of such film actually could be "harmful." Hence the general principle is that an element external to a film is neither necessarily relevant, nor necessarily irrelevant to the determination of the film under the Ohio censorship statute.

But concerning films unlawfully transported, or those otherwise possessed *mala fide*, the question arises whether they can be lawfully an object of proper application. If not, they cannot be examined and cannot be approved (or disapproved).

It is further to be observed that the censorship standard obtains its partial meaning from the whole legal order. A picture whose exhibition would be a ground for criminal prosecution if the censorship statute did not exist, cannot be approved under the censorship statute. Thus obscene pictures and pictures of crime are banned by the criminal code even without the censorship laws. What crime is, is determined by the whole criminal area of the legal order. And this is how the whole legal order determines partially the meaning of the censorship standard. The rest of the meaning of the standard is filled by the social norm of ethics and etiquette. What the social norms are is a question of fact, but the question is so difficult to answer that it may be practically beyond rational determination, and if this is the case the determination must be done by will more than by reason, in other words, it is arbitrary and it is fully in the hands of the censors. For this reason it may be utterly impossible to show that an order of the agency is "unreasonable."

The censorship agency of Ohio, similarly as those of other states, issued from time to time a set of guiding principles, indicating the policies of the agency in more concrete forms.

In respect to the viewing of the films, it may be added that the law insists that the order of the agency must actually incorporate the discretion and judgment of the agency; hence it might be objected against an order which the agency passed under intimidation, hastily, under hypnosis, and so on.

When a decision has been reached, the agency issues an (4) *order* to notify the party submitting the film about the result of the administrative proceeding.

The order may be a basis of further proceedings if a real party in interest is dissatisfied with it. However, it is to be presumed that also the negative fact of (4a) *not-rendering any order* in due time would be a sufficient basis for the proceeding against the agency by mandamus or procedendo, or mandatory injunction. Otherwise it would be

possible to suppress certain films simply by an endless postponing of decision.

If a film is approved the order issued on basis of such approval is named Certificate of Approval and it contains the name and number of film, statement of eliminations ordered, if any, and some other data stipulated by the law. Together with this document the agency also issues the so called leader for projection upon the screen. If the film is rejected, such leader, of course, is not issued.

While the law prescribes the form of the certificate of approval, no form is prescribed for the notification whereby rejection of film is announced.

(5) When an order has been issued it can be the object of *complaint* of a dissatisfied party. The courts in some cases have held that only property interest qualifies a party as a real party in interest, but other times have indicated that property interest is not an indispensable condition and that, for instance, city officials may assail an approval of a film if they think that public welfare requires it. The latter view is correct as there is nothing in the law which would restrict the concept of "interest" to mean "property interest". In the pre-1943 period the petition for (5a) *administrative hearing* was an indispensable prerequisite of a petition for (5b) *judicial review*; according to some parts of the law no issue could be raised before the court which had not been specified in the petition for administrative hearing, while there are in the law other parts which seem to waive this rigor. The recodification of film censorship laws in 1943 abolished the administrative hearing *as mandatory* for a party seeking judicial review, but the *right* of hearing now exists, we think, under the administrative act of 1943 which applies to all licensing process. In contradistinction to the old type of hearing, there can be, under the named act, either a prospective or subsequent hearing. The old type of hearing was only remedial and not preventive (could be held only after order was rendered, not before). The criterion under which the order of the agency is to be scrutinized, is whether the order was "lawful and reasonable". The expression "lawful" in this context is a redundancy, since if a legal hearing is granted about a certain action it is always to determine its lawfulness. Only the word "reasonable" has a normative import. Judicial review in all cases involving an order of the censorship agency was and is to be sought at the supreme court of Ohio by commencement of action, but this proceeding, original in form, is appellate in nature and the appellate act of 1935 applies in certain respects.

Since the law stipulates that every film intended for public exhibition in Ohio is subject to censorship, there arise the questions (6) what is every film and (7) what is public exhibition. By the word "film" the law may mean either the content of the film, or the

physical reel of celluloid on which the pictures are recorded. It seems obvious that for the purposes of censoring only the intangible quality, i.e., the content of the film, not the physical substrate, is relevant. The censorship agency does not and is not supposed to view every physical strip on which a copy of the original is recorded; it is enough to view one of any number of identical copies. *The collection of fees ought to be adjusted accordingly.* The censorship agency, we think, has neither the right, nor the duty to view the second and further copies of the same picture, and cannot be compelled to do so even by an offer of a party to pay the fees again. Even if both the agency and the party agree about such a proposal, we think such an agreement is in nature private and not warranted by the law.

The term "film" otherwise includes the auditive element as well as the visual one, and names of films are also subject to censorship.

Concerning the term "public exhibition," no clear cut definition exists. But it is settled that exhibitions in public schools are of public character; and usually the fact that fees are collected at an exhibition will create the presumption that the exhibition is public. It need not be, however, necessarily so. By analogy from another field, the conclusion offers itself that for instance exhibitions before fraternal organizations are of private nature, presumably even if some compensation is asked for.

Televised motion pictures offer a special problem. In our opinion, the fact that television as such is not touched by the censorship law does not confer immunity upon the publication of a film by means of television.

THE APPLICATION FOR CENSORSHIP

The first step in film censorship proceedings is the presentation of a film for censorship. The constant policy of the law has been to require that this should be done before the film is delivered for exhibition. In 1913, the language of the law was:²²⁶ "Such films shall be submitted to the Board before they shall be delivered to the exhibitor for exhibition." In 1915²²⁷ it was somewhat extended: "Such films shall be submitted to the Board and passed and approved by the Board before they shall be delivered to the exhibitor for exhibition." The language of 1933 is identical, but the act of 1935 uses the word "division" instead of "board," and the statute of 1943 employs the words "Department of Education" in the respective context. The latter language also is found in the law of 1947.

Although the law never speaks about "application" in respect to the act of presenting the films for censorship, and does not prescribe

²²⁶ 103. OHIO LAWS at 400; OHIO GEN. CODE § 871-48.

²²⁷ 105-106 OHIO LAWS 325; OHIO GEN. CODE § 871-48.

any formalities therefor, it is obvious that the act of sending a film to the censorship agency stands for a twofold application—first, that the film be inspected, and second, that it be approved.

In most cases the application will be accepted and the film will be inspected, but this need not be always the case. It may well be that the person who makes the application has either no *duty* or no *right* to do so, and in such instances the agency ought to dismiss or reject the application—which is a very different action from the disapproval of the film itself.

A film is improperly submitted for censorship when, for instance, it is not intended for "public exhibition" in Ohio. Here there is, primarily, no *duty* to submit the film, and the corresponding right to ask for its censorship is accordingly also absent. On the other hand, it seems that a film unlawfully possessed cannot be lawfully submitted for examination. In this case it is the *right* to make the application which is primarily non-existent. A situation illustrating this point actually arose when certain films were submitted for censorship which had been illegally transported into Ohio.

CENSORSHIP OF SPOKEN LANGUAGE

With the development of various phonetic devices replacing written text projected upon the screen to explain the content of the pictures, the question arose whether also the auditive element was subject to censorship. The problem is reflected in a letter of Mr. Clifton, the Director of Education, of 1928:²²⁸

In the censorship of moving pictures the following question has arisen, upon which your opinion is respectfully asked,

the Director wrote to the Attorney General:

Certain films are now being offered which do not have printed statements or titles running with the pictures, but which instead have with them the records for spoken statements or titles. As the film is run these words are made audible, and constitute for the pictures the explanatory matter. In some cases the firms submitting the films give the matter to be heard by the audience with them under protest, and they now insist that I am not acting within my legal rights in demanding this matter or in ordering the elimination or modification of such spoken words connected with the films as I deem objectionable. Believing that spoken words are essentially the same in their effects as the corresponding words cast upon the screen, when connected with the pictures as the words like print might have been, I have deemed the censoring of such words for sound reproduction with the pictures a subject for censorship of moving

²²⁸ 1928 Ohio Atty. Gen. Op. 1447.

pictures, to be treated for elimination under Section 871-49. . . . The questions therefore are (1) whether the Director of Education has authority to censor spoken matter which accompanies motion picture films, as in the 'movietone' or 'vitaphone'; (2) if so, whether that authority would have certain limitations, and if so, what limitations; (3) whether the spoken matter . . . may be required to be submitted with the films to be censored, and whether films may be rejected because of spoken matter judged to be harmful, or eliminations in this spoken matter may be ordered to be made.

Naturally, the Attorney General sustained the view of the Director of Education. He said:

It is quite certain that neither the vitaphone picture film nor the movietone picture film were known at the time of the enactment of Sections 871-48 *et seq.*, General Code, above quoted. . . . [But] the mere fact that [these inventions] were unknown at the time of the enactment of the film censorship law is not conclusive of the right of the Board of Censors to censor said films, and, if the occasion requires, order eliminations to be made from the same. As I see it, the vitaphone or movietone feature of the picture film in its presentation to the public is still but an incident of the moving picture. And the most that can be said of the vitaphone . . . or the movietone . . . is that each of them is but a species or kind of movie picture film.

The Attorney General then concluded that the spoken matter should lawfully be required for examination, eliminations ordered in it as in the picture itself, and that a film can be rejected on basis of the content of the spoken matter.

CENSORSHIP OF TITLES OF FILMS

On May 11, 1945, a film was approved under the title *One Third of a Nation*.²²⁹ Four years later it probably appeared desirable, from the exhibitor's standpoint, to add further attraction to the picture, and some promise was seen in changing the name of the same film to *The Houses of Shame*. The censorship agency was asked to approve the change. In connection with this case, the Director of Education, Mr. Hisson, wrote to the Attorney General:²³⁰

Does the Division of Film Censorship . . . have the authority to consider the title as an integral part of any picture and therefore refuse a change of title which may seem to be misleading or, if necessary, reject the picture for showing in Ohio because the title is not truly indicative of the nature of the picture?

Answering, the Attorney General stated that in his opinion

²²⁹ 1949 Ohio Atty. Gen. Op. 706.

²³⁰ *Ibid.*

the phrase "motion picture films" of Section 154-47 of the General Code meant all the ingredients of a motion picture and was not limited solely to the celluloid from which the pictures were portrayed on the screen.

It would be manifestly absurd, he continued, to contend that the legislature by the use of the term "films" intended to limit the censorship of the Department of Education to the pictures contained in films and not the dialogue contained in the sound track. It would seem just as absurd to contend that a film which met the requirements of the statute as to pictures and sound track or subtitles would have to be approved by the Department of Education even though the title contained some lewd or lascivious words. Second, Section 154-47b, *supra*, provides in part: ". . . Such certificate (of approval) shall also show the title of such film. . . ." It would be foolish to assume that the legislature intended to require the Department to issue a certificate of approval of a film containing a title which the Department considered to be in violation of the sections of the General Code relating to censorship.

However, the Attorney General further emphasizes that the determination of the status of such title of a film must be done exclusively under the standard of the statute—i.e., it must be considered whether the title is moral, educational, or amusing and harmless—and it is not for the censor to determine in what relation the title stands toward the picture. This point of the opinion might well be questioned. If, as we have seen, the manner of transportation of a film may be considered to bear upon the effect of the exhibition of it and upon the quality of such effect under the statutory standard, it would seem that a palpably misleading relationship between the content and the name of a film is hardly less relevant.

CENSORSHIP FEES

A prerequisite for the action of the censorship agency is the payment of a fee by the person submitting the film for censorship. The fee varied from time to time. In 1913, the law read:²³¹

"The Board shall charge a fee of one . . . dollar for each reel of film to be censored which does not exceed one thousand . . . lineal feet,"

and two dollars for longer films. In 1915, the latter part of the sentence was modified²³² to the effect that "one dollar [was to be collected] for each additional one thousand lineal feet or fractional

²³¹ 103 OHIO LAWS 400.

²³² 105-106 Ohio Laws 325.

part thereof," and this formulation was retained in the act of 1933;²³³ in 1935, however, the fee was increased to three dollars per thousand feet²³⁴ and it was in this act that the provision was incorporated that

Fifty per cent of all moneys received from motion picture license fees . . . in excess of such amount as shall be necessary to pay the operating expenses, including salaries, of the Division of Film Censorship shall be paid into a fund to be used by the Director of Education for disseminating information relative to the history, scenic beauties . . . etc., of Ohio through the Office of the Director of Visual Education,"

and that

The total sum so set aside annually . . . are hereby and hereafter appropriated to the Controlling Board for the use of the Department of Education.

This formulation was retained in 1943²³⁵ and 1947.²³⁶ By this legislation the censorship proceeds have been overtly declared a revenue measure. In 1914, the federal circuit court sustained the censorship law against the objection of unconstitutionality under the commerce clause on the ground that "If the receipts are found to average largely more than enough to pay the expenses [of the service], the presumption would be that the legislature would moderate the charge."²³⁷ Not only did this hope not become realized, but the charge was, as it appears, even increased. Which is more, the censorship office saw still greater possibilities in the law. The problem which pressed the censorship administration was explained in a letter to the Attorney General of November 5, 1945:

When a film submitted for censorship by a motion picture producer is approved, the Division of Film Censorship issues a certificate and the necessary leaders authorizing the picture to be shown anywhere in the state of Ohio. . . . Frequently, at some time subsequent to the censorship of the picture, the producing company may sell the picture to some independent company or individual. The question we desire answered is: If a company which had submitted a picture for censorship and paid the censorship fee . . . sells this picture to another company, is the original certificate and its authority to exhibit the picture in Ohio transferred to the company buying the picture or should this company be required to submit the picture for censorship . . . before it has the right to the use of the leaders and to have a certificate issued in its name, giving it the legal right to exhibit the picture in the state?

²³³ 115 OHIO LAWS 199.

²³⁴ 116 OHIO LAWS 101.

²³⁵ 120 OHIO LAWS 481.

²³⁶ 122 OHIO LAWS 400.

²³⁷ *Mutual etc. v. Industrial Commission*, 215 Fed. Rep. at 146. The phrase was adopted from another case.

This time, the attorney general seems to have been moved somewhat more warmly than usual. He retorted, *inter alia*:

The owner of the film is not subjected to any examination or censorship. . . . There is nothing in the law which in any way limits or regulates the sale or other disposition of an approved film, and no provisions for exacting a second fee from an assignee of the original.

The letter of the Director of Education, unsuccessful as it has been, demonstrates characteristically the temptations which arise for administrative agencies whose activity is connected with the possibility to exact revenues, however praiseworthy the purpose which the revenues serve. Much of the insistence to impose censorship even after the Supreme Court has spoken this May,²³⁸ and after it has been made entirely clear that the present interpretation of the Constitution will hardly tolerate unbridled censorship, becomes understandable in light of the motives underlying the last quoted letter.

While the transfer upon further parties of a film already examined by the censorship office cannot be a reason for reiteration of the censorship thereof, it is at the same time true that the censorship agency is empowered to recall films for re-censoring whenever it thinks public welfare requires it. This authority, however, hardly may be interpreted to the effect that whenever public welfare requires more revenue, films may be revoked for re-censoring in order to exact fees from the film industry.

We may ask, on the other hand, whether the censorship agency has the duty to re-censor a film upon application of a party. It does not seem probable that the re-censoring of an approved film should be sought, but it may be that rejected films should be re-submitted from time to time with the hope that their approval will be achieved. What is the obligation of the censorship agency in these cases? We think that so long as it is assumed that the film actually is the same, it represents an adjudicated matter and there is no duty upon the censorship agency to reconsider it. However, a complication arises here which was of relevancy in connection with the problem discussed in the paragraph on censoring private lives of film actors. Namely, that certain environmental factors inherent in the social situation are as relevant for the determination of a film as is the intrinsic content of the film itself. We might speak, brachylogically, about the *situational identity* of the film. And in this sense "the same" film may appear to be "no longer the same," because of the changes which took place in the sociological or cultural medium and which place the film functionally into a different context. Thus a film which might have violated a moral norm in 1920 may be entirely acceptable

²³⁸ *Burstyn v. Wilson*, 343 U.S. 495 (1952); *Gelling v. Texas*, 343 U.S. 960 (1952).

in 1950, and conversely. On such basis, then, the re-censoring of a film may be legitimately demanded. But the mere change of owner or possessor of a film seems to be as little a good ground for such demand as it is no ground for the censorship agency to impose a second censorship on the film of its own accord.

JUDICIAL REVIEW.

From 1913 to 1943 the basis of judicial review was section 871-38 of the General Code, made applicable to film censorship by the reference clause of the original censorship act, viz., Section 871-53 of the General Code. From 1943 onwards, the same content has been carried by section 154-47h of the General Code. That the reorganization act of 1921 did not discontinue the rights of judicial review was established in 1924 in the case of *Sullivan v. Riegel*.²³⁹

The supreme court of Ohio has had exclusive jurisdiction in reviewing orders of the film censorship agency.²⁴⁰ The law determines that relief must be sought by commencement of action²⁴¹ and the supreme court dismissed a case styled as an appeal.²⁴² However, the appellate procedure act of Ohio²⁴³ understands under the words "appeal"

. . . all proceedings whereby one court reviews or retries a cause determined by another court, an administrative officer, tribunal, or commission,²⁴⁴

so that under the language of that act, whose applicability is general, a commencement of action of the type before us is a kind of appeal. The distinction between appeal and commencement of action is both nominal and real. The mere designation of the action as an appeal where commencement of action was requested by law in the case quoted, would not be sufficient, we think, to disqualify the form of pleading. But if the actual incidents of an original action were neglected and those of an appeal used, then the dismissal was justified. For the abstract concept of appeal under the appellate procedure act includes, obviously, many possible forms of pleading, and commencement of action may be one of them. If the latter is required by law, the special requirements must govern. It is no fault to say that review is appealed for by a commencement of action.

The second interesting question, constitutional in nature, would be whether such a form of pleading should be considered as invoking

²³⁹ 25 Ohio N.P.N.S. 118 (1924).

²⁴⁰ OHIO GEN. CODE § 871-38 (prior to 1943); OHIO GEN. CODE § 154-47h (after 1943).

²⁴¹ *Ibid.*

²⁴² *Hallmark v. Division of Film Censorship*, 153 Ohio St. 596 (1950).

²⁴³ 116 OHIO LAWS 104.

²⁴⁴ *Id.*, 105; OHIO GEN. CODE § 12223-1.

the original, appellate, or revisory jurisdiction of the Ohio supreme court.²⁴⁵ The first temptation is to say that commencement of action is naturally a pleading invoking original jurisdiction. Original jurisdiction of the Ohio supreme court includes five forms of pleadings,²⁴⁶ of which only mandamus and perhaps quo warranto seem suitable as a remedy against an order of an administrative agency. Mandamus actually has been used in *Midwestern v. Clifton*,²⁴⁷ but two other cases²⁴⁸ were named "petition to vacate order," a third, connected with the *Midwestern* case, *idem*, was named "petition for review" and a fourth, which we already mentioned, was called an appeal and dismissed. One case was construed as an error proceeding: *Epoch* etc., Ohio State Reports, Vol. 95, p. 400 (1916). It is a question whether these "petitions to vacate order" or "petitions for review" must be understood as actions in mandamus rather than independent forms arising from the revisory jurisdiction of the supreme court. That the action of the court is at any rate revisory or appellate in nature in these cases is obvious, and the language of the censorship law either in its original form or in its present form is not so restrictive as to allow the court exclusively to mandamus the agency. The court is free also to *amend* the order, and on this basis it could, we think, for instance order eliminations in a film in its own discretion, substituting itself for the censorship agency. Such an action would be very different from a mandamus to the agency, and since mandamus is practically the only form of pleading under the original jurisdiction of the supreme court applicable to film censorship matters, it would seem rather probable that these forms of relief arise the revisory and possibly appellate jurisdiction of the court. Yet its appellate jurisdiction could be, in these cases, invoked only where a constitutional question is raised, so that the most probably correct conclusion is that the power invoked here is the revisory category of the court's authority, for which the text of the Ohio constitution affords a particularly good warrant. It reads:²⁴⁹

The supreme court . . . shall have . . . such revisory jurisdiction of the proceedings of administrative officers as may be conferred by law.

This language fits perfectly the situation before us.

Concerning the scope of review, it has already been said that in film censorship cases the court will examine the film itself,²⁵⁰ and

²⁴⁵ OHIO CONST. Art. IV, §2.

²⁴⁶ Quo warranto, mandamus, habeas corpus, prohibition, procedendo.

²⁴⁷ 118 Ohio St. 91 (1928).

²⁴⁸ *Committee v. Bowsher*, 132 Ohio St. 599 (1937); *Hallmark v. Division of Film Censorship*, 153 Ohio St. 595 (1950).

²⁴⁹ OHIO CONST. Art IV, § 2.

²⁵⁰ As was done in *Hallmark v. Division of Film Censorship*, 153 Ohio St. 595 (1950).

will not treat the determination by the administrative agency as a determination of fact by a jury, i.e., as conclusive.

The time for the appeal to the supreme court has been determined under the appellate procedure act,²⁵¹ Section 12223-7 of the General Code, while no time limitations were contained in the respective provisions of the censorship laws prior to 1943²⁵² and are not contained in the present law.²⁵³ The supreme court found that the limit was ten days.²⁵⁴

A case which was decided by the Ohio Supreme Court in the very recent past, October 15, 1952,²⁵⁵ further illustrates the presence of a constitutional problem in the scheme of judicial review of film censorship decisions. The "syllabus" abstracted from the case is, we think, misleading. It does not reflect the essence of the case. It reads as follows:²⁵⁶

Petition for review of Department of Education's order rejecting film submitted to it by plaintiff for examination and censorship is not a new proceeding which need only be commenced within time set forth in general appeal statute, but the petition must be filed within time limit for taking of appeals as provided in the censorship of films statute.

But as the reading of the case shows, the argument is not whether the petition for review is an appeal under the general appellate procedure act or under the special remedial provision of the censorship statute, but the argument is whether it is an appeal at all. Plaintiff contends that it is not, on the strong authority of the *Hallmark* case which was dismissed by the very same court in 1950 on the ground that the statute required original action and not an appeal. Nevertheless, the court then applied the general appellate statute, i.e., Section 12223-7 of the General Code. And in our present case, plaintiff not only does not urge that this section should be applied, as the "syllabus" thinks he does, but it is his very aim to extricate his case from the impact of that section, because this is the provision which cuts off his hope for remedy by limiting the time. On the contrary, if the plaintiff could get his case under the special provisions of the censorship law proper, he would be lucky, for there no time limit is found. But here the *Bowsher* case experience²⁵⁷ teaches that the court will not adopt this construction. Therefore the only strategy plaintiff

²⁵¹ 116 OHIO LAWS 104.

²⁵² OHIO GEN. CODE §§ 871-33, 871-53.

²⁵³ OHIO GEN. CODE § 154-47h.

²⁵⁴ See *Committee v. Bowsher*, 132 Ohio St. 599. As the respective provision reads "In appeals, to the supreme court . . . twenty days . . . In all other appeals, within ten days," it is a question how the court arrives at its conclusion.

²⁵⁵ *Classic Pictures v. Department of Education*, 108 N.E. 2d 319 (1952).

²⁵⁶ *Id.*, 319, 320.

²⁵⁷ 132 Ohio St. 599 (1937).

can employ is to say that the petition for review, being, according to law, a commencement of action, does not fall under any appellate provision at all, and that the time for its filing has no deadline whatsoever. And on the basis that this amphibious remedial phenomenon, which both is and is not an appeal, has primarily the *nominal* quality of *commencement of action*, the constitutional problem arises. The court says:²⁵⁸

Plaintiff contends that the proceeding in this court is an "action," a new proceeding, commenced by filing a petition, and that the time within which the action may be brought is not limited by Section 12223-7, General Code.²⁵⁹

And then there follows the highly important passus:

If plaintiff's contention were true, the General Assembly would have conferred upon the Supreme Court original jurisdiction in addition to that conferred by the Constitution. Such legislation would be void.

The supreme court is here involved in contradictions. First of all, plaintiff's contention *is* true, as the court itself corroborated in the *Hallmark* case. Secondly, there is no reason to say that by giving a chance to commence an action before the supreme court, the legislature conferred an original jurisdiction in addition to that conferred by the constitution, because such an action can be well accommodated under the aegis of mandamus, as actually has been done before, or, as we think, possibly also under quo warranto. Thirdly, this action can be excellently fitted into the court's *revisory* jurisdiction, as demonstrated above. The only category where it is a little difficult to fit the action is the appellate capacity of the court, because there, according to the constitution, only cases coming from lower appellate courts can be placed or cases involving constitutional issues or felonies. But this does not preclude the applicability of the general appellate statute because the definition of appeal *in that statute* is so broad as to include such an original action, only if such action is actually a device whereby a revision of a decree of some governmental authority is sought. As the syllabus of the case states,²⁶⁰ "Petition for review of Department of Education's order rejecting film submitted to it by plaintiff for examination and censorship *is not a new proceeding*. . . ." ^{261, 262}

Until the present case, the problem inherent in the collision between the real nature of such remedial proceeding and its form,

²⁵⁸ *Id.*, 320.

²⁵⁹ Obviously the contrary to the language of the syllabus.

²⁶⁰ *Id.*, 319 in *fine*.

²⁶¹ My italics.

²⁶² The text then immediately continues: " . . . which need only be commenced within time set forth in general appellate statute. . . . " Obviously a new proceeding has nothing to do with any appellate statute.

seems never to have been noticed. Also, the element in the Ohio constitution called "revisory jurisdiction" of the supreme court has been, it seems, a dormant clause whose potentialities have not been explored yet. In our opinion, the scheme is as follows: The proceeding is essentially appellate in nature, but this does not prevent it from having the form of original action. In this latter capacity, it must have all the aspects of an action, but in its appellate nature it allows of the application of the general appellate act, although it does not necessarily invoke the appellate jurisdiction of the supreme court. This is so because the restricted conditions allowing of appeal to the supreme court, as set forth in the constitution, indicate a narrower definition of appeal than is the definition used in the appellate procedure act.²⁶³ The proceeding in question can be placed then on the basis of either the *original* jurisdiction of the supreme court, or on the basis of its *revisory* jurisdiction. In no event does the legislature confer an authority additional to that constitutionally conferred. On the contrary, it only uses the constitutional arrangement.

CENTRAL AND LOCAL CENSORSHIP.

In 1917, four years after state censorship of films had been established, an attempt was made to add local censorship to that of the state. The case arose in the city of Cleveland.²⁶⁴ The Mayor of the city relied upon the provision of the Ohio constitution known as the Home Rule Amendment of 1912,²⁶⁵ which puts the jurisdiction over local matters into the hands of local authorities, and prohibited the showing of a film which had been approved by the Ohio Board of Censors.²⁶⁶ The film was said to have the tendency of disturbing peace, and such an effect, it was contended, invoked the jurisdiction of the Mayor as conservator of peace and called for intervention.²⁶⁷

The Cuyahoga county court of common pleas, considering the argument, observed that the jurisdiction of local authorities, granted by the Ohio constitution, was limited to the extent that its exercise be in conflict with the general state statutes and laws.²⁶⁸ From this the court infers that a city ordinance which attempts to regulate a subject matter already regulated by a general statute, is *eo ipso* void.²⁶⁹ On this ground the Mayor was enjoined and free passage was given to the showing of the film.

²⁶³ In the administrative procedure act the definition is even more narrow. 120 OHIO LAWS 359.

²⁶⁴ The Epoch Producing Corp. v. Harry L. Davis, Mayor of Cleveland, 19 Ohio N.P.N.S. 465 (1917).

²⁶⁵ OHIO CONST. Art. XIII.

²⁶⁶ It was a film entitled *The Birth of a Nation*, and its topic was the Civil War.

²⁶⁷ *Id.*, 466, 477.

²⁶⁸ *Id.*, 477.

Twenty-one years later, in 1938, one more attempt was made to the same effect. This time, the city of Cincinnati attempted to superimpose municipal censorship in addition to that of the state.²⁷⁰

(Interestingly enough, the film producers also included in their defense a renewed contention that film censorship was unconstitutional,²⁷¹ which of course was flatly rejected by the court²⁷² under the aegis of the leading "Mutual" decisions, *supra*.) The city, against which injunction was sought, invoked both the 18th article of the Ohio constitution, and section 3657 of the General Code, according to which regulation of theaters was a local matter within municipal jurisdiction.

With reference to the *Epoch v. Davis* case, *supra*, the court declared the action of the city unlawful.

It is interesting to note that in both these cases the courts showed the tendency to consider the very existence of a general statute a sufficient reason of invalidity of a local ordinance regulating the same subject matter, although in the second of these two cases an enquiry was also made as to whether the particular order of the Mayor conflicted with the particular order of the censorship board.

We can imagine a theoretical situation such that a local authority would follow exactly the decisions of the state Board of Censors in its own orders, and ask whether such parallel orders, not conflicting with those of the Board, would be valid in order that we may distinguish the two types of conflict which the courts obviously contemplated, but did not quite clearly indicate. The theoretical question involved is, to repeat, whether the existence of a general statute is itself enough to render a local ordinance regulating the same topic invalid, or whether such an invalidity reaches only to the extent of an actual conflict with the general statute.

The following quotation from the decision of the second case shows how the court fails to distinguish between the two principles; the court asks:²⁷³

The state of Ohio having set up the complete machinery for the censorship of films of this state, and having approved and certified a motion picture film, does an ordinance of a municipality which attempts to confer power upon its city manager to prohibit or order deleted a part of such motion picture, or to threaten to revoke a license of a motion picture house, for showing such picture, conflict with the general law?

²⁶⁹ *Id.*, 477, 478.

²⁷⁰ *The American Committee on Maternal Welfare v. City of Cincinnati*, 11 Ohio Op. 366 (1938).

²⁷¹ *Id.*, 368.

²⁷² *Hamilton County Common Pleas*.

²⁷³ *Id.*, 370, 371.

The first part of the statement suggests that the very existence of a complete machinery for censorship, established by a general statute, renders local ordinances regulating the same subject, void. That such position is included in the opinion of the court is also demonstrated by the court's reference to the maxim *Expressio unius est exclusio alterius*, used also in the *Epoch* case, to indicate that if one complete mode of film censorship procedure was set up by general laws, its very existence precludes the exercise of a concurrent power by a local authority. In this sense what is affected by invalidity is not only the order of the Mayor which prohibited the showing of the particular film, but the very ordinance of the city which confers on the Mayor the power to make such decisions. And it appears that it was the latter ordinance whose invalidity the court asserted:²⁷⁴

The court is therefore of the opinion that insofar as ordinance 184-6 [of Cincinnati] attempts to confer power and authority upon the city manager to prohibit the exhibition of a motion picture which has been approved by the State Board of Censors, or to revoke a license previously granted . . . or in any manner interfere with the exhibition of such picture, the ordinance is void and of no effect.

The second part of the first quotation, however, considers rather whether there is a concrete conflict between the particular order of the Mayor, and the order of the Board of Censors. Several definitions of the term "conflict" are discussed there.

It is easy to see that the situation here analyzed is analogous to the problems of concurrent powers, such as appear for instance under the Commerce Clause of the National Constitution. Here as there, the mere grant of power to the higher authority does not mean *eo ipso* the removal of all of it from the lower one. And the Ohio constitution in its Home Rule provision limits the rights of municipalities to regulate local matters only in case of an actual conflict with a general law. The fact that a law about a certain subject exists, does not preclude the municipalities from adding their own regulations to it, only if they do not conflict with it. Obviously conflict is not the only one possible relationship between two norms regulating the same broader subject. Hence we think that the legal order of Ohio contains nothing which would deny the legitimacy of local film censorship, if otherwise such censorship is lawful and is a local matter. In principle, the concurrent power of a municipality is not denied by anything in the constitution or in the content or the existence of the censorship act. And the only question which remains is whether in the given case there was a conflict between the general law and the local action.

The court, relying on several definitions of conflict, all of them much to the same effect, observes that where an ordinance permits that

²⁷⁴ *Maternal Welfare, supra*, at 371.

which a statute prohibits, or prohibits that which a statute permits, is in conflict with it.

Against this definition there can be no objection, but the question is how it applies to the case in dispute.

The Ohio film censorship laws say that

... no films may be publicly shown or exhibited within the state of Ohio unless they have been passed and approved by the board [of state censors]. . . .²⁷⁵

All this text determines is that films not approved by the state may not be shown. The court infers from this that films in this manner approved may be shown. But this is a logical fallacy, an invalid inference consisting in the determination of the "consequent" through the negation of the "antecedent."²⁷⁶

Therefore we conclude that from the text of the law and of the Ohio constitution no prohibition of local film censorship may be inferred. And further corroboration of this view is found in the intent of the persons drafting the text of the law. In the sessions of the Senate, when the original draft was discussed, it was proposed to enlarge the bill by the statement that films which have been approved by the state censorship board could be lawfully shown anywhere within Ohio. The proposal was defeated.²⁷⁷ This fact, we think, is quite eloquent. Obviously the intent here was to avoid preclusion of actions by authorities other than the board, and this attitude harmonizes with a provision of the industrial commission act enacted shortly before, in the same year,²⁷⁸ viz., section 871-28 of the General Code. It is prescribed there that

Nothing contained in this act shall be construed to deprive the council of any city or village or any board of trustees or officer of any city or village of any power or jurisdiction over or relative to any place of employment [except certain cases which we can omit here].²⁷⁹

The censorship act and the Industrial Commission act had then a close interpretive connection by virtue of the fact that the Board of Censors was originally a part of the Industrial Commission. Moreover,

²⁷⁵ 103 OHIO LAWS 400; OHIO GEN. CODE § 871-51. (1913), retained essentially to the present day.

²⁷⁶ The logical scheme is:

If p , then q ;

and p , therefore q .

The wrong scheme is

If p , then q ;

not p , therefore not q .

In the latter case q is indetermined in correct logic.

²⁷⁷ 103 OHIO SENATE JOURNAL 679.

²⁷⁸ 103 OHIO LAWS 95.

²⁷⁹ 103 OHIO LAWS 105.

there is seen, from the above quotation, a general tendency of the legislature to respect local government and so to promote the spirit of the Home Rule Amendment. Under this general premise, and by analogy from the concrete provision of the industrial commission act, and perhaps under that provision directly, local jurisdictions obtain an important status also in film censorship matters.

In the presence of these arguments, and in the absence of the possibility to conceive as a conflict of laws the fact that a local order prohibits a film which was approved by state censors under the Ohio censorship laws, we see no opportunity to insist that in these concrete cases the intervention of the local officers was unlawful. And in general, we cannot but conclude that the Ohio film censorship laws did not abolish local film censorship. We think that there are, under the legislation as we have had it since 1913, concurrent powers such that both the state and the local authorities may exercise censorship. Of course a film prohibited by the state cannot be lawfully shown. But this does not mean that an approved film is immune against local intervention.

The will of the courts in these cases is a wise one, but it is the will of the courts and not that of the law.

In this connection we may briefly allude to a part of the industrial act which contemplated the conflict between state and local law. Section 871-28 of the General Code²⁸⁰ provides for a hearing before the Industrial Commission of any person affected by any local order in conflict with an order of the Industrial Commission, which the orders of the censorship board were held to be. On this basis both the film exhibitors and the city mayors could, we think, have sought a hearing. The commission had the power to modify the local order,²⁸¹ as well as its own. The possibilities inherent in this provision were, for film censorship proceedings, somewhat remote.²⁸² But as a curiosity of administrative law, the phenomenon is worthy of consideration and justifies this brief mention.

²⁸⁰ *Ibid.*

²⁸¹ *Id.*; OHIO GEN. CODE § 871-28 (3).

²⁸² See especially paragraph (2) of the same section.